Final Appellate Jurisdiction in the Scottish Legal System

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Executive Summary

The report presents the findings of a review of final appellate jurisdiction in the Scottish legal system undertaken in the light of the recent establishment of a new Supreme Court for the United Kingdom. The aim of the review was to examine the nature, strengths and weakness of the Scottish final appellate system, taking account of its historical development and of comparative perspectives, and to consider the case for reform.

Chapter One introduces three key historical features of final appellate jurisdiction in the Scottish legal system. These are the abiding link to the legal and political framework of the United Kingdom as a whole, the absence of a clear distinction between ordinary and constitutional jurisdiction, and the different treatment of civil and criminal appeals.

In *Chapter Two* the broader political context framing Scots law and its distinctive scheme of final appellate jurisdiction is addressed. In particular, the idea of the United Kingdom as a Union state is developed as a lens through which we may appreciate more fully the character of the evolved law and practice.

Chapter Three focuses more closely on the shaping of the Scottish final appellate framework since the Union of 1707, with specific reference to the three themes and tensions introduced earlier—part versus whole, ordinary versus constitutional and civil versus criminal.

Chapter Four introduces a comparative perspective. The relationship between the appellate court systems of the UK and of Scotland is illuminated by consideration of other decentralized or multi-level arrangements where the smaller national or regional unit possesses a significant measure of jurisdictional autonomy. Equally, the relationship between ordinary and constitutional jurisdiction and between civil and criminal jurisdiction within the Scottish system is compared to other legal systems with regard to their various ways of combining or separating jurisdictions within the appellate chain. In conclusion, however, the highly distinctive unique character of the Scottish situation is reaffirmed, with only modest lessons to be drawn from comparative experience.

Chapter Five specifies a number of criteria for evaluating the merits of any scheme of final appellate jurisdiction and applies these criteria to the Scottish scheme. The criteria in question are democracy, fair treatment, coherence and integrity, richness of resources, expertise, detachment, operational effectiveness and economy. On examination, some of these values, notably democracy, fair treatment, richness of resources, coherence and integrity and expertise, are more relevant to the assessment of final appellate jurisdiction than others, though the relationship between these values and the institutional design of the court system remains complex. There is simply no single model of appellate jurisdiction that provides an optimal institutional expression of any of these values considered separately, still less all in combination.

Finally, *Chapter Six* considers a number of different options for reform of present arrangements in the light of the prior historical, comparative and evaluative analysis and draws some general conclusions. Six general models are suggested, some of which allow for internal variation and sub-division. *Model One* proposes an autonomous Scottish appellate court system. Its more radical variant envisages a fully autonomous court system based in

Scotland and serving a fully autonomous Scots law, an option which would be feasible only within an independent Scotland. Its less radical variant envisages a fully autonomous court system based in Scotland, with the exception of the judicial treatment of those constitutional questions relevant to the continuing integrity of the United Kingdom state. *Model Two* goes to the opposite extreme and has Scottish appellate arrangements fully integrated into a UK-wide appellate court system, accompanied by the general erosion or eclipse of Scots law as a distinct order and the development of a unitary law for the United Kingdom. *Model Three* maintains the present arrangement, with the UK Supreme Court the top court for civil appeals and for devolution issues and the High Court of Justiciary the top court for criminal appeals. Models Four to Six each envisages some reform of the present institutional apparatus. *Model Four* contemplates a Scottish Division or Chamber of the UK Supreme Court. *Model Five* restructures the UK Supreme Court as a final appeal court along quasi-federal lines. *Model Six* draws on the example of the European Court of Justice and has a United Kingdom Court of Justice equipped with a reference jurisdiction rather than with a final appellate jurisdiction.

The radical version of *Model One*—a fully autonomous appellate court system for a fully autonomous Scots law—presupposes fundamental constitutional reform and the replacement of the Union state with a sovereign Scottish state. In these altered constitutional circumstances it represents a perfectly coherent option, and one that would be in line with international practice. We examine different blueprints for the institutional design of such a fully autonomous system, concluding that a self-standing Scottish Supreme Court with separate procedures for ordinary and constitutional jurisdiction would offer the optimal arrangement for an independent Scotland.

All the other options are premised upon more or less autonomy within the existing Union state. The conditionally autonomous variant of *Model One*, where all except constitutional questions would be reserved to Scottish courts in a still sovereign British state in which a measure of Westminster legislative authority continued alongside the legislative authority of the Scottish Parliament, appears both infeasible and quite unsatisfactory in terms of the key values set out; this is so because it ignores the need to tailor appellate jurisdiction to the appropriate legislative and democratic level and to distribute that jurisdiction accordingly. For that reason, this option was discounted. So, too, and for similar reason, were solutions under *Model Two* which would situate themselves towards the opposite end of the constitutional spectrum and eradicate the identity of Scots law or the distinctiveness of its appellate system.

Of the more modest options, *Model Three*, with its retention of the division of final appellate jurisdiction both within the UK Supreme Court (as regards constitutional and ordinary matters) and between the UK Supreme Court and the Scottish courts (as regards civil and criminal matters) has its attractions, especially in allowing for the continuation and refinement as a matter of judicial practice of a sensitive approach to the difference between those cases raising substantively distinct questions of Scots law and those that do not. However, the conservative quality and informality that are the major strengths of this approach are also its main weaknesses, as it does not address certain standing anomalies of the system (in particular the quite different treatment of civil and criminal appeals), and as it cannot guarantee the long-term stability of its informal advantages. Of the other options, the idea of a Scottish division or chamber of the Supreme Court (*Model Four*) is at best a partial answer to a larger question of proper jurisdictional boundaries, while the reference-based model of a British Court of Justice (*Model Six*) involves a considerable shift in the apex

court's approach and does not guarantee that it will have the effective last word in those matters which fall properly within its jurisdiction.

The model of a quasi-federal Supreme Court (*Model Five)* envisages that those Scottish cases (both civil and criminal) raising common UK issues be heard by the Supreme Court, preferably at a Scottish location, and those Scottish cases (again, both civil and criminal) addressing distinct questions of Scots law be dealt with by the indigenous Scottish courts. It is most acute in its diagnosis and most sensitive to the relevant values at stake in its treatment of the complex mix of divergent and convergent influences that lies at the heart of the relationship of Scots law and its appellate court system to that of the UK as a whole. It is also reasonably capable of overcoming the difficulties of asymmetrical reform of the institution of the UK Supreme Court. For these reasons we recommend it as the most attractive reform option under the present constitutional settlement.

Chapter One:
Introduction Remit, Context and Plan of Review

1.1 Remit

In December 2008 I was asked by the Cabinet Secretary for Justice to conduct a review of final appellate jurisdiction in the Scottish legal system in the following terms:

"… to provide… an overview of the historical development of final appellate jurisdiction in the Scottish legal system; to identify the established constitutional principles of such jurisdiction and to provide appropriate international comparisons.

[T]o appraise the features, benefits and disadvantages of the current Scottish arrangements, and to assess options for future developments in order to present... conclusions and recommendations by December 2009."[1]

1.2 Context

In order to appreciate why such a review might be useful at the present time we must take into account certain recent developments affecting final appellate jurisdiction in the Scottish legal system as well as the deeper historical backdrop. Many of the features that distinguish the Scottish scheme of final appellate jurisdiction have a lengthy pedigree. Yet contemporary constitutional developments have changed some aspects of that scheme and cast others in a new light. In so doing, these developments provide both an enhanced justification and a new opportunity for assessing the merits of current arrangements.

1.2.1 The Immediate Context

The most important contemporary development is the Constitutional Reform Act 2005. Section 40 of the 2005 Act provides that an appeal from any order or judgment of a court in Scotland will henceforth lie to a new Supreme Court of the United Kingdom if it currently lies from a court in Scotland to the House of Lords. This provision, therefore, carries over from the House of Lords to the new Supreme Court the longstanding right of final appeal for civil cases from decisions of the Court of Session. Similarly, Schedule 9 of the 2005 Act transfers jurisdiction in "devolution issues" from the Judicial Committee of the Privy Council to the new Supreme Court. Devolution issues are questions concerning the extent and limits of the competence of devolved legislative and executive institutions within the United Kingdom, and as such they include questions about the competence of the Scottish Parliament and Executive.[2] These provisions of the 2005 Act have already come into force and the new Supreme Court commenced work on 1st October 2009.

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[1] See the response to a written parliamentary question by the Justice Secretary (Mr Kenny MacAskill) on 15th December 2008 (S3W-18796): http://www.scottish.parliament.uk/business/pqa/wa-08/wa1215.htm; and The Scottish Government press release: http://www.scotland.gov.uk/News/Releases/2008/12/15093413.

[2] Scotland Act 1998 s 98 and Sch 6.

The extent to which this double transfer of jurisdiction to the new court will make a difference to the process or outcome of Scottish final appeals is unclear. However, three aspects of the shifting constitutional landscape are worthy of remark.

First, the inauguration of a new top or 'apex' court for the United Kingdom—situated for the first time outside the Houses of Parliament—cannot be dismissed as a matter of mere constitutional form. We may not be able to predict with any certainty how this new court will work or whether and in what ways, over time, its *modus operandi* may affect the operation of the Scottish legal system, influence the development of Scots law and its relationship to English law and other constituent jurisdictions of the UK, and perhaps change our understanding of the overall constitutional settlement. Yet, as we shall argue, it would be unwise to assume that such a major institutional change will have *no* significant effects.[3]

Secondly, the transfer of final appellate jurisdiction to an institution (the Supreme Court) that is not part of the UK Parliament eliminates one major obstacle to any legislative initiative by the Scottish Parliament designed to remove or alter the more venerable part of the London-based Scottish jurisdiction, namely appeals in civil cases. The UK Parliament is one of the subject-matters reserved to the Westminster legislature under the general heading of 'The Constitution' in the Scotland Act 1998,[4] which established the present Scottish Parliament and Executive. With the relocation of the top court to a different venue that reservation is no longer a relevant consideration in determining which legislature is competent to legislate on final appellate jurisdiction.[5]

Thirdly, the devolution issue jurisdiction established under the 1998 Act, and now transferred by the 2005 Act from the Judicial Committee of the Privy Council to the new Supreme Court, introduces a specialist constitutional jurisdiction to Scots law for the first time. In this case, unlike that of ordinary civil appeals, it is clear that the Scottish Parliament cannot act on its own to alter the relevant legal framework. The Scottish Parliament is not competent to vary the terms of a judicial authority that decides on the extent and limits of the Scottish Parliament's own powers and which was established under the same Act as created the Scottish Parliament itself.[6] Nevertheless, such a significant innovation has clearly contributed to the overall development of final appellate jurisdiction in Scotland. Moreover, the involvement of the constitutional jurisdiction in that broader pattern of development is accentuated by the policy choice, expressed in the 2005 Act, to combine the newer constitutional jurisdiction with the older civil appellate jurisdiction in the one court, where previously there had been two separate final appeal courts i.e. the House of Lords and the Judicial Committee of the Privy Council. For these reasons, the new constitutional jurisdiction is one we must take into account in any rounded assessment of final appellate jurisdiction.

1.2.2 The Fuller Historical Background

These recent innovations are only the latest chapters in a long narrative of the development of final appellate jurisdiction in Scots law. Three features of that historical narrative stand out and define what is distinctive about the Scottish situation.

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[3] See Chapters 3.5 and 4.3.
[4] Scotland Act 1998 Sch 5 Pt I para 1.
[5] Although difficult questions remain about the extent of the Scottish Parliament's jurisdiction in this area. See Chapter 2.4.
[6] Scotland Act 1998 Schedule 4 Pt 1 para 4.

In the first place, there is the broader political context. Scotland has for more than 300 years been part of the sovereign state of the United Kingdom. Today, Scots law remains but one jurisdiction within the United Kingdom alongside the jurisdictions of England (and Wales)[7] and Northern Ireland.[8] The situation is in some respects similar to that which affects federal states, with a division and tension between the authority of the whole and the authority of the parts. As we shall see, 'federal' comparisons distort as much as they enlighten in the present context, and the better characterization of the political and legal basis of the decentralized UK state is that of a Union state.[9] But regardless of the terminology we use, a first key defining feature of Scottish final appellate jurisdiction, and the most basic reason why Scots law is faced with the unusual situation of having a final appellate court that sits outside its 'home territory' and which it shares with other legal systems, lies in the historical fact of the location of Scots law, and the Scottish legal system more generally, within a larger sovereign polity.

In the second place, there is the unusual constitutional character of the United Kingdom. The United Kingdom has been and remains a rarity in the global family of sovereign states in lacking a documentary Constitution with the status of fundamental law and a body of constitutional law based upon that written source.[10] One consequence of this has been that there is no basis upon which any court concerned with the laws of all or any of the constituent jurisdictions of the UK[11] may develop a special constitutional jurisdiction, or at least one formally recognised as such. So neither the House of Lords, nor the successor Supreme Court can be regarded as a 'constitutional court' in the sense understood in many other countries.[12] Certainly, the UK courts, in particular the higher and appellate courts, have always dealt with a number of matters, including judicial review and human rights issues, that have typically been at the heart of the constitutional jurisdiction of top courts in those states that do possess a written Constitution. What is more, with the passage of the Human Rights Act 1998 as well as the Scotland Act 1998 and the other recent devolution statutes, there is a more explicit acceptance and recognition of an informal constitutional jurisdiction. Yet, today, the general blurring of the distinction between ordinary law and constitutional law remains a defining feature of final appellate jurisdiction as it affects Scots law, as also the law of the other constituent jurisdictions of the UK.

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[7] The process of devolving powers to Wales has been an incremental one. The two key statutory stages in that process have been the Government of Wales Act 1998 and the Government of Wales Act 2006. This has led to increasing discussion of whether and to what extent it may be appropriate to speak of a distinctive Welsh legal system: see e.g. CMG Himsworth 'Devolution and its Jurisdictional Asymmetries' (2007) 70 MLR 31. See also the Lord Chief Justice of England and Wales's summary of recent legal developments from a Welsh perspective: Rt Hon Lord Judge 'Lecture to the Legal Wales Conference' 9th October 2009: http://www.judiciary.gov.uk/docs/speeches/lcj-legal-wales-conf.pdf.

[8] The Northern Ireland Act 1998 provided for the return of legislative and executive devolution to Northern Ireland after a gap of 26 years following the suspension of the then Parliament of Northern Ireland in 1972.

[9] See Chapter 2.

[10] Other states without a documentary Constitution recognized as fundamental law include Israel and New Zealand. Even in these cases, however, there is a concentration of constitutional provisions in key legislative texts, and to that extent a greater acknowledgment of a separate body of constitutional law than is the case in the United Kingdom.

[11] However, the Judicial Committee of the Privy Council has enjoyed a clear constitutional jurisdiction with regard to overseas territories, and continues to do so: see further C Thompson-Barrow *Bringing Justice Home: The Road to Final Appellate and Regional Court Establishment* (Commonwealth Secretariat 2008). A recent example is the Judicial Committee's consideration of the position of the Chief Justice of Gibraltar: *Hearing on the report of the Chief Justice of Gibraltar* [2009] UKPC 43.

[12] See Chapter 4.3.

In the third place, there is the unusual position of Scots criminal law. Unlike civil law,[13] final appellate jurisdiction in Scots criminal law lies within Scotland, to the High Court of Justiciary. Indeed, this has been settled practice for most of the history of the Union. Elsewhere, it is by no means unknown to locate final appellate jurisdiction in civil and criminal cases in different chambers of the same court, and indeed to have quite distinct appellate hierarchies below the level of the top court.[14] However, to locate these jurisdictions at quite different levels within the one sovereign polity is unique, and has been a further distinguishing feature of the inherited scheme of Scottish final appellate jurisdiction continued under the 2005 Act.

These three distinguishing features and the tensions they encapsulate—part versus whole, ordinary versus constitutional and civil versus criminal—together with the refinements that have been brought about by the recent developments mentioned at the outset, provide the starting point for our inquiry. They provide the basis upon which any assessment of the strengths and weaknesses of Scottish final appellate arrangements must proceed, as well as the practical point of departure for the contemplation of reform.

1.3 Plan of Review

The examination of the nature, strengths and weakness of the Scottish final appellate system and consideration of the case for reform will proceed as follows. In **Chapter Two** the broader constitutional context framing Scots law and its distinctive scheme of final appellate jurisdiction is addressed. In particular, the idea of the Union state is developed as a lens through which we may appreciate more fully the character of the evolved law and practice. **Chapter Three** focuses more closely on the shaping of the Scottish final appellate framework since the Union of 1707, with specific reference to the three themes and tensions—part versus whole, ordinary versus constitutional and civil versus criminal—introduced above. **Chapter Four** develops a comparative perspective. It starts from the premise that different aspects of the Scottish system require different comparators. The relationship between the UK whole and the Scottish part is illuminated by consideration of other decentralized or multi-level arrangements. Equally, the relationship between ordinary and constitutional jurisdiction and between civil and criminal jurisdiction within the Scottish system is usefully compared to other legal systems with regard to their various ways of combining or separating jurisdictions within the appellate chain. **Chapter Five** specifies a number of criteria for evaluating the merits of any scheme of final appellate jurisdiction and applies these criteria to the Scottish scheme. Finally, **Chapter Six** considers a number of different options for reform of present arrangements in the light of the prior historical, comparative and evaluative analysis and draws some general conclusions.

[13] For the purposes of the present report, 'civil law' is defined broadly to include all areas of law other than criminal law.
[14] See Chapter 4.3.

Chapter Two: The Constitutional Context

2.1 Introduction

What general background features of the present constitutional arrangements governing Scotland must we take into consideration if we are to understand the terms and limits of debate over final appellate jurisdiction? In the present chapter we will explain how the unusual and persistent character of the United Kingdom as a Union state provides a vital context for our inquiry. The wider framework of the Union state helps account for many of the distinguishing features of the Scottish legal system in general and its final appellate court arrangements in particular, as well as influencing the options for reform.

2.2 The Union State

The United Kingdom does not easily fit within a conventional constitutional category. It is neither a straightforwardly *unitary* state, nor does it meet the terms of a classically *federal* state. A unitary state is characterized by its concentration of all key dimensions of constitutional authority—legislative, executive and judicial—within a single legal and political structure. To the extent that authority is devolved in the unitary state, any such devolution is limited in scope, remains under the ultimate control of the centre, and may revert to the centre if the centre so dictates.

A federal state is characterized by a much more pronounced decentralization of power. It involves a settled division of authority between central or 'federal' institutions of government on the one hand and provincial, state or regional institutions of government on the other. Both levels of government retain a significant sphere of authority, which they can exercise either without the permission or control of the other level of government or at least without the possibility of unilateral encroachment or interference by the other level of government[1] (and, in the case of a provincial level of government, without the permission, control or interference of other regional levels of government within the same federation). In addition, the balance and relations of authority between federal and provincial levels is specified in terms—typically contained in the 'higher' or supreme law of a written Constitution—that either cannot be varied at all or cannot be varied without the consent of institutions at both levels of government or the constituencies they represent.

The United Kingdom stands somewhere between the unitary and the federal models. On the one hand, there is no constitutional guarantee of the independent authority of the constituent nations and their legal and political systems. This absence has both a

[1] In states characterized under the head of 'dual federalism', the classic example of which is the United States of America, governmental competences are typically split and mutually exclusive, and so the core of the federal relationship will consist in the preservation of an autonomous domain of action over which the other level of government has no veto or control. In states characterized under the head of 'co-operative federalism', the most prominent example of which is modern Germany, many competences will be shared between the two levels of government, and so the core of the federal relationship will consist in the prohibition of unilateral action in defined areas by either level of government.

specific and a general aspect and significance. Specifically, under the various devolution statutes passed over the last dozen years including the Scotland Act,[2] the UK Parliament retains the right to legislate in devolved matters[3] and, similarly, ministers of the UK Government reserve certain powers to interfere in matters of devolved competence.[4] Generally, the doctrine of parliamentary sovereignty in any case entails that a later UK Parliament can always undo or amend the legislation of an earlier one. Therefore, any scheme of devolved powers, such as that contained in the Scotland Act, remains in principle susceptible to repeal or modification by the UK Parliament at a later point without the consent of the devolved institutions or the constituencies they represent.

On the other hand, the constituent parts of the United Kingdom are very differently treated under the existing constitutional structure, and in all cases informal controls provide at least some compensation for the absence of constitutional guarantees of autonomy. Most emphatically in the case of Scotland, to a lesser extent in Northern Ireland, and to a still lesser extent in Wales, the legislative and executive authority devolved is greater in depth and scope than we would expect under the merely 'local' government of a unitary state.[5] Furthermore, the political circumstances that precipitated and have continued to accompany these grants of power—namely broad and settled support for at least some measure of political autonomy on the part of the peoples of the constituent nations of the United Kingdom—mean that in practice their reversal or modification could hardly be contemplated absent the consent of the constituent parts themselves. This, indeed, is in some measure recognized in the development of new constitutional conventions governing the terms of adjustment of the devolution settlement.[6]

How, then, should we characterize the 'in-between' status of the United Kingdom? One answer, which has become increasingly influential in recent times, is to conceive of the UK as a Union state.[7] The import of this term is twofold. In the first place, it suggests something distinctive about the level of integration of the parts within the state. The concept of a Union, unlike the idea of the 'unit' which is the nominal term from which the notion of a 'unitary state' is derived, implies the continued existence of the parties to the Union, albeit now joined in a settlement of permanent or at least indefinite duration. Secondly, the idea of a Union makes a historical and politico-

[2] Scotland Act 1998; Northern Ireland Act 1998; Government of Wales Act 1998; Government of Wales Act 2006.
[3] Scotland Act 1998 s 28 (7).
[4] Scotland Act 1998 ss 35, 57, 58 and 93.
[5] And much greater than was provided for under the earlier aborted devolutionary scheme for Scotland; see the Scotland Act 1978 s 18 and Schs 2, 10, 11 and 12.
[6] In particular, through the so-called Sewell Convention, which provides that the UK Parliament should not legislate within an area of devolved competence without the agreement of the Scottish Parliament: see CMG Himsworth and CM O'Neill *Scotland's Constitution: Law and Practice* (2nd edn Bloomsbury Professional Ltd Haywards Heath 2009) [5.22].
[7] Following the introduction of the term by Stein Rokkan and Derek Urwin, ('Introduction: Centres and Peripheries in Western Europe' in S Rokkan and D Irwin (eds) *The Politics of Territorial Identity: Studies in European Regionalism* (Sage London 1982)), the idea of a Union state has been the subject of much recent analysis. See e.g., N Walker 'Beyond the Unitary Conception of the United Kingdom Constitution?' [2000] *Public Law* 384-404; S Tierney *Constitutional Law and National Pluralism* (OUP Oxford 2004); C Kidd *Union and Unionism: Political Thought in Scotland, 1500-2000* (CUP Cambridge 2008); M Keating *The Independence of Scotland: Self-government and the Shifting Politics of Union* (OUP Oxford 2009). Other prominent contemporary examples of Union states are Spain and Canada.

sociological point to reinforce the basic conceptual one. Great Britain was created (in 1707) out of the two prior nation states of Scotland and England, and the United Kingdom out of their fusion with a third, Ireland (in 1800). To the (variable)[8] extent that it has succeeded in retaining the support of its constituent nations, the United Kingdom has been required through its general political system and culture to continue to acknowledge that legacy and retain something of these diverse roots.

More specifically, the idea of a Union state suggests five constitutional background features, all of which are directly relevant to our discussion of final appellate jurisdiction in Scotland.

2.3 Evolved rather than Designed

A Union state is a state whose constitutional arrangements have evolved slowly over time rather than having been made the subject of a plan or design. At no point has a constitutional system been established from first principles. Much is made of the rarity of the so-called 'unwritten' quality of the United Kingdom Constitution.[9] What is certainly true is that it has never been 'written up' in canonical form, the focus of a comprehensive and integrated vision. Rather, it has been a cumulative achievement, an amalgam of different ideas and institutions continually adapted to new circumstances.

That is one reason why, as we shall see, the Scottish arrangements for final appellate jurisdiction in the Union state do not easily fit any of the categories we recognize from a comparative understanding of appellate systems.[10] On the one hand, these arrangements are not simply one indistinct part of a comprehensively integrated whole, with a fully convergent final judicial appellate machinery developed to match and support a single body of law, as we would expect of the constitutional design of a unitary state. On the other hand, these arrangements do not suggest a systematically decentralized whole, with a separate Scottish-based final appellate machinery developed to match and support a separate 'regional' stream of law alongside a pan-UK stream, as we would expect of the constitutional design of a federal state. Rather, a hybrid structure has slowly evolved, its different parts reflecting different phases in the uneven history of the Union state. One part of the hybrid involves highly autonomous elements inherited and retained from the pre-Union framework of Scottish courts and a system of Scots law. The other part of the hybrid involves post-Union centralizing tendencies, with the House of Lords and now the Supreme Court reflecting and in some measure reinforcing within the appellate structure the development of a body of law common to some or all jurisdictions of the UK.

[8] Clearly, as is demonstrated by the history of violent conflict between (Irish) nationalists and (UK) loyalist communities, which reached a peak between the late 1960s and mid 1990s, Northern Ireland is the part of the UK where the legitimacy of the Union settlement has been most contested.
[9] Other examples include Israel and New Zealand. On the continuing relevance of the unwritten quality of the UK constitution today for many areas of constitutional law other than the distribution of authority between the whole and the constituent parts, see e.g. A King *The British Constitution* (OUP Oxford 2007); V Bogdanor *The New British Constitution* (Hart Publishing Oxford 2009).
[10] See Chapter 4.2.

2.4 Provisional rather than Final

The integrity of the Union state depends upon the negotiated settlement between the parts continuing to be both functional for the whole and satisfactory to the various parts. That settlement lacks certain important aspects of fixity and finality associated with many unitary and federal states. This has both a legal and a political dimension. Legally, the provisional quality of the Union settlement refers to the lack of a higher constitutional law entrenched against reform. Politically, it has to do with the continuing significance of the constituent nations (as cultural and juridical entities) and the lack of definitive accommodation of their national aspirations within a federal settlement.

This helps explain why the question of final appellate jurisdiction, like so many other parts of the constitutional framework, remains unsettled today, even after the passage of the Constitutional Reform Act and the setting up of the Supreme Court. More broadly, it tells us why the future of final appellate jurisdiction cannot be considered apart from the ongoing question of the broader constitutional settlement across the various parts of the United Kingdom. The unfixed and unfinalised quality of that broader constitutional settlement is relevant to the question of future prospects in two ways.

In the first place, and in the immediate term, the provisional quality of the constitutional settlement implies a complex and shifting *platform* of legal authority from which reform may be contemplated. Since the passage of the Scotland Act 1998, competence to redesign Scottish appellate jurisdiction has been split along a fluctuating line between the different levels of the Union state. Under the Scotland Act, most matters concerning the Scottish legal system broadly conceived, including the administration of justice and the structure and operation of the court system,[11] are devolved, though there are some notable exceptions. These include the continued existence of the High Court of Justiciary and the Court of Session as criminal and civil courts of first instance and appeal[12] and matters of judicial remuneration.[13] More directly to the point, as already noted, competence as regards the reform of *final* appellate jurisdiction is also split. Prior to the introduction of the Supreme Court, the reservation to Westminster of matters concerning the Parliament of the United Kingdom provided a strong if inconclusive[14] argument against devolved competence

[11] An important recent legislative initiative of the Scottish Parliament in this area is the Judiciary and Courts (Scotland) Act 2008, which introduces a statutory guarantee of judicial independence, unifies the Scottish judiciary under the leadership of the Lord President of the Court of Session, places the Judicial Appointment Board for Scotland on a statutory footing, provides for the first time a formal scheme of judicial discipline and reforms the law relating to the removal of judges and sheriffs from office, and reorganizes the governance of the Scottish courts system by establishing the Scottish Courts Service as a non-ministerial government body to be chaired by the Lord President; see in detail, J Harrison and CMG Himsworth, *Judiciary and Courts (Scotland) Act 2008 (asp 6)*Current Law Statutes Annotated.

[12] Scotland Act 1998 Sch 5 Pt I para 1 (d) and (e).

[13] Scotland Act 1998 Sch 5 Pt II Section L1.

[14] Adam Ingram Civil Appeals (Scotland) Bill [SP Bill 77] (http://www.scottish.parliament.uk/business/bills/77-civilappeals/index.htm); Lord Hope 'Taking the Case to London: Is it all Over?' (1998) JR 135; CMG Himsworth 'Presiding Officer Statements on the Competence of Bills' (2007) 11 Edin LR 397. Arguably, the reservation concerning the Houses of Parliament only applied to their acting in their ordinary legislative capacity and not to their acting in their (extraordinary) judicial capacity.

in this area. The transfer of jurisdiction to the new Supreme Court eliminates that particular argument with regard to the removal of the final appellate jurisdiction in civil cases, although this does not necessarily exhaust the legal objections that might be taken to unilateral removal.[15] In addition, any variation in the Scottish appellate jurisdiction before the Supreme Court short of outright removal—including, for example, the provision of more restrictive grounds or procedures for civil appeal or the introduction of a new appellate jurisdiction before the Supreme Court in Scottish criminal cases—would probably remain outside the competence of the Scottish Parliament.[16] What is more, any variation of the devolution issues jurisdiction transferred from the Judicial Committee of the Privy Council to the new Supreme Court would certainly lie outside the competence of the Scottish Parliament. Realistically, therefore, on account of the shifting complexities of the constitutional division of authority, most possible options to reform the scheme of final appellate jurisdiction for Scotland would require co-operation between Holyrood and Westminster.

In the second place, and in the longer term, the ultimate destination of the shifting constitutional settlement may provide a decisive *influence* over the emerging shape of final appellate jurisdiction. That is to say, although many important details will remain to be resolved regardless of the more basic (re)settlement between centralizing and nationally autonomous forces within British constitutional politics, the general design of the scheme of final appellate jurisdiction is likely to track any such basic settlement as may emerge.[17]

2.5 Asymmetrical rather than Symmetrical

As noted above, the Union state incorporates various legal and constitutional elements of the historical nations from which it is formed. And since these historical nations are not themselves identical in legal and constitutional terms either in their pattern of development or in their current needs and aspirations, we cannot assume that the existing structure of the Union state or its projected design should involve symmetrical treatment of the parts.

This is relevant to the consideration of final appellate jurisdiction in a number of respects. To begin with, as with many other parts of the constitutional settlement, the institutional pattern is itself non-uniform. The treatment of final appellate jurisdiction in Scotland is quite different from other parts of the UK. That Scottish criminal appeals, uniquely amongst the constituent jurisdictions of the UK, did not go to the House of Lords and do not go to the new Supreme Court is only the most obvious example of this. Furthermore, any projected settlement must continue to take account of symmetry and its absence in two ways. There is both a liberating and a constraining

[15] For example, removal of the Supreme Court jurisdiction without adequate replacement might be argued to constitute a violation of the right to a determination of one's civil rights and obligations before a court under article 6 of the ECHR, and so, as a breach of 'convention rights', to lie outside the legislative competence of the Scottish Parliament; Scotland Act 1998 s 29 (2) (d).
[16] Scotland Act 1998 s 29 (2) (a) makes it incompetent for the Scottish Parliament to legislate such that a measure forms part of the law of a country or territory other than Scotland. This would prevent any unilateral reform at the Scottish level purporting to modify the jurisdiction or procedures of the London-based, UK-wide Supreme Court.
[17] See Chapter 6.2-3.

element to this. On the one hand, there is neither a constitutional requirement nor a compelling case in terms of optimal institutional design that any solution be symmetrical. As a matter of law and practice, in our sprawling constitutional landscape asymmetrical arrangements may continue to be contemplated without any presumption of inferiority. On the other hand, the lack of symmetry may nevertheless create impediments to coherent institutional solutions. In particular, it may be difficult to reconcile within a single institutional solution the different expectations of the different constituent jurisdictions of the UK with regard to the role of the central appellate court. The Supreme Court, like the House of Lords before it, is and can remain an umbrella court, performing different functions and following different procedures in respect of the different legal systems of the United Kingdom. Yet there are limits to its versatility, and, as we shall see, these may militate against the discovery of the optimal solution for Scots law and the Scottish legal system.[18]

2.6 Deep Diversity and Formal Divergence

The Union state has the potential to be both less and more internally diverse than the federal state. It is likely to be less diverse inasmuch as there is no fixed and final settlement setting out the areas in which the polity is permitted to continue to 'grow apart' rather than 'grow together'. This is further considered at 2.7 below. Equally, however, the Union state is capable of being more diverse than the federal state, in part for the very same reason. The lack of a fixed settlement closely specifying areas of competence within the remit of the different levels of government also supplies a silent constitutional permission for continuing diversity. And if we add to this the consideration that the Union state grew out of a deeply etched pattern of difference among the pre-existing national entities, then the scope for diversity is underlined.

In the instant case, although we should be careful not to impose today's categories on yesterday's world, prior to the Union agreement of 1707 Scotland was for most intents and purposes a sovereign state in its own right, with effective control over both internal and external affairs.[19] As such, it had its own Parliament, laws, and system of administration of justice, including, crucially, its own court system, with the office of sheriff originating no later than the twelfth century and the College of Justice placed on a formal statutory footing as early as 1532. Scotland also had its own political institutions and other social and cultural institutions typically associated with the civil society of an autonomous state, such as Church, education system, economic organisations and professional bodies. With the exception of the Parliament, these forms and manifestations of autonomy survived the Union and supplied a distinctive juridical, governmental and societal vehicle to carry forward Scottish autonomy to the present day.

This deep well of difference helps to account for the resilient distinctiveness of the Scottish legal system both in formal and substantive terms. Formally, Scots law and the Scottish courts system, on account of their pre-Union roots, continue to inhabit a legal jurisdiction quite separate from the other legal jurisdictions of the UK. For all that it holds in common with the laws of the other jurisdictions of the UK, the Scottish

[18] See Chapter 6.
[19] See e.g. C Kidd *Union and Unionism: Political Thought in Scotland, 1500-2000* (CUP Cambridge 2008) chapters 2 and 3.

legal system retains an identity entirely distinct from these other jurisdictions. There is no such thing as 'UK law', but only the mutually exclusive jurisdictions of the constituent legal systems; and, since, with the exception of certain statutory UK-wide tribunals, actions under the formally separate and exclusive system of Scots law must be brought within a separate and exclusive system of Scottish courts up to the very point of final appeal, we can also reasonably conclude that there is no such thing as a 'UK court system'. Indeed, in formal terms, even the Supreme Court itself, like the predecessor House of Lords, is not one court but many, its umbrella status speaking not only to its functional versatility but to its variety of formal identities as an English, Scottish and Northern Irish court.[20]

Further, the fact that so much else of the Scottish political and cultural system survived 1707 means that the autonomy of Scots law and the wider legal and court system is by no means *just* a matter of form. Some areas of the pre 1707 Scots law—mainly its common law rather than its statute law—have survived, and for most of the history of the Union, even prior to legislative devolution in 1998, there has been some measure of recognition in Westminster and Whitehall of the need to retain a separate stream of Scottish legislation and some provision of the procedural means to deliver this.[21] Today, alongside its separate court system, the Scottish legal system continues to express many individuating features. Reflecting their roots in the system of civilian law that has exerted such a profound influence over Scots law, many areas of private law, notably property, succession and family law remain highly distinctive in content from the laws of the other jurisdictions of the UK.[22] Contemporary Scots criminal law, too, both substantive and procedural, remains not insignificantly different from that of its neighbours—the legacy of a distinct society and framework of governance.[23] Even in public law, where the common political system might be expected to provide a remorselessly unifying effect, Scots law remains distinct at the margins.[24] In broader systemic terms too, there is significant evidence of autonomy. Scotland remains a separate jurisdiction for the purpose of private international law, and boasts its own legal profession and system of legal education and qualification.

The formal autonomy of the Scottish legal system, therefore, at least in some measure, continues to be reflected in substance.

2.7 Close Intermeshing and Substantive Convergence

As noted, however, the Union state has always also has the potential to 'grow together'. As a counterbalance to the resilient strain of diversity, the absence of an entrenched federal demarcation and protection of local competence has also helped to foster convergence of institutional forms, public policy, and even of background

[20] Constitutional Reform Act 2005 s 41. See further Chapter 3.3 and Appendix III.
[21] See CMG Himsworth 'The Scottish Grand Committee as an Instrument of Government' (1996-97) 1 Edin LR 79; CMG Himsworth and CM O'Neill *Scotland's Constitution: Law and Practice* (2nd edn Bloomsbury Professional Ltd Haywards Heath 2009) [3.15]-[3.17].
[22] See e.g. R Evans-Jones (ed) *The Civilian Tradition in Scotland* (Stair Society 1995); DL Carey Miller and R Zimmermann (eds) *The Civilian Tradition and Scots Law: Aberdeen Quincentenary Essays* (Duncker & Humblot Berlin 1997).
[23] See e.g. L Farmer *Criminal Law, Tradition and Legal Order: Crime and the Genius of Scots Law 1747 to the present* (CUP Cambridge 1997).
[24] For discussion see e.g. CMG Himsworth 'Devolution and its jurisdictional asymmetries' (2007) 70 MLR 31.

politics and culture. Thus, until 1998, with the exception of Northern Ireland for most of its short post-1920 history,[25] the Union possessed no regional Parliaments but only the one central legislature at Westminster. And for all that there was some central recognition of separate jurisdictional needs, inevitably much of the legislation that flowed from this single institutional source and site of representative government was common to the different jurisdictions of the UK. Equally, until 1998, again with the exception of Northern Ireland, the Union knew only administrative (but not political) devolution in the executive branch. Furthermore, the political system more generally, including the organisation of party politics and the concentration of political debate, was primarily (if far from exclusively) located at the wider British level. In the broader cultural sphere, moreover, 'Britain' became a focus of national identity to rival that of its Scottish, English, Irish and Welsh constituents.[26]

In such a closely intermeshed system, regardless of the formal separation of legal systems a high degree of substantive convergence is inevitable. For all that, as we have seen, Scots law in many areas has continued to plough a separate furrow, in other areas the effect of the common political and cultural space has been to produce a close alignment of laws. The trend in most of public law and an increasing body of statutory criminal law is a convergent one. Even in private law, the effect of a long process of political, cultural and economic convergence, reinforced by the wider union brought about by European integration, has been to generate much commonality in areas such as contract, commercial law and negligence.

This gap between form and substance is both reflected in and reinforced by the arrangements for final appellate jurisdiction. For all its formal variety, the House of Lords remained an institutional unity, with the same personnel hearing cases from the various jurisdictions of the United Kingdom; and this is also true of the successor Supreme Court. Given the significant overlap in the substantive content of the law of the various jurisdictions, it is not difficult to explain how a practice has developed within the single judicial institution situated at the apex of the various court systems, and, indeed, in the inferior courts of the various jurisdictions that feed the top court, of common treatment of those areas of law deemed to be common to the various jurisdictions of the UK.[27]

[25] See e.g. C McCrudden 'Northern Ireland and the British Constitution since the Belfast Agreement' in J Jowell and D Oliver (eds) *The Changing Constitution* (6th edn OUP Oxford 2007).
[26] See e.g. L Colley *Britons: Forging the Nation, 1707-1832* (2nd edn Yale University Press New Haven 2005).
[27] See further Chapter 4.2

Chapter Three:
The Development of Final Appellate Jurisdiction

3.1 The Terms of the Union Settlement

The nation states of England and Scotland came together on the 5th May 1707 to form a single Union state, to be known as the United Kingdom of Great Britain.[1] The legislation creating the new state, which was passed in both parliaments, contained provisions relating to the institutions of the new state, including those related to the administration of justice in Scotland. The Union legislation specifically provided for the continuing existence and authority of the Court of Session and High Court of Justiciary.[2] However, in addition to protecting those courts, the legislation also stated:

> '…that no causes in Scotland be cognoscible by the courts of chancery, queen's bench, common-pleas, or any other court in Westminster Hall [3]; and that the said courts, or any other of the like nature after the union, shall have no power to judge, review or alter the acts or sentences of the judicatures within Scotland, or stop the execution of the same.'[4]

The exact meaning of this passage has proven controversial. On the one hand it may be taken to indicate that Scottish cases should not be decided in courts outside Scotland; on the other hand, its terms are less than categorical. Whatever its intention, the effect of the measure was that Scottish litigants were not barred from appealing to the House of Lords, because the House of Lords did not sit as a court in Westminster Hall. It has been suggested that this was a deliberately vague provision that assuaged Scottish sensitivities concerning the prospect of domination by English institutions, while at the same time being sufficiently ambiguous to allow appeals to be taken to the House of Lords by those who might value an extra review of their legal situation.[5] The attractions of such a course even had some historical backing. The Claim of Right of 1689 had also specifically provided that an appeal from a decision of the Court of Session would lie to the Parliament of Scotland. The House of Lords was a part of the parliament which replaced the Parliament of Scotland, and so provided a natural alternative and successor.

Whatever the balance of background influences, in the absence of a prohibition on Scottish appeals to the House of Lords, a large number of Scottish litigants took appeals to the House of Lords, and the House of Lords accepted this appellate jurisdiction. Accordingly, the House of Lords assumed a final appellate jurisdiction for civil appeals from Scotland.[6]

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[1] See Union with Scotland Act 1706 Art 1; Treaty of Union 1706 Art 1. See further PH Brodie 'Scotland after 1707' in L Blom-Cooper B Dickson and G Drewry (eds) *The Judicial House of Lords 1876-2009* (OUP Oxford 2009) 279 n 1.
[2] Treaty of Union 1706 Art 19.
[3] Westminster Hall was the location of the central English courts at the time of the Union.
[4] Treaty of Union 1706 Art 19.
[5] See Appendix I pp 7-10.
[6] For a more in depth account of the historical development see Appendix I.

This historical narrative is important for our understanding of the present appellate jurisdiction of the United Kingdom Supreme Court. The Constitutional Reform Act 2005, we may recall, provides that an appeal will lie from a Scottish court '…if an appeal lay from that court to the House of Lords at or immediately before the commencement of this section.'[7]

3.2 The different treatment of civil and criminal appeals

The Claim of Right asserted that there was an appeal from the Court of Session to the Parliament of Scotland, but it did not make the same assertion with respect to appeals from criminal courts. The question whether criminal appeals from Scotland could be heard by the House of Lords was one which generated controversy for some time.[8] Although there was arguably one successful early criminal appeal from Scotland to the House of Lords,[9] the weight of authority came to be strongly against allowing criminal appeals. In *HMA v Murdison*[10] the question of a criminal appeal to the House of Lords was fully ventilated. The convicted prisoners presented a petition of appeal to the House of Lords which, on 10th March 1773, refused to hear the case. Such was the strength of the decision MacLaurin was moved to state 'Thus was the great question, as to the competency of appeals from the court of justiciary, at last determined in the negative.'[11] Less than ten years later in the important *Bywater* case the House of Lords once again asserted that a criminal appeal from the High Court of Justiciary was not competent.[12] Therefore, just as the existence of a criminal appeal to the Parliament of Scotland before the Union seems dubious, eighteenth century decisions suggest that the possibility of extension of such an avenue to the Parliament of the United Kingdom was definitely foreclosed by then.

With the enactment of the Criminal Procedure (Scotland) Act 1887 the legislature specifically provided that there could be no criminal appeals from the High Court of Justiciary, thereby removing any remaining doubts with regard to the possibility of a criminal appeal to the House of Lords. Today it remains the case that civil law and criminal law are formally distinguished,[13] and that appeals in criminal matters to the United Kingdom Supreme Court are not competent.[14] The current legislative provisions that render a criminal appeal incompetent are: 1) section 124 (2) of the Criminal Procedure (Scotland) Act 1995, which states that decisions of the High Court of Justiciary '…shall be final and conclusive and not subject to review by any court whatsoever.'; and 2) the aforementioned section 40 (3) of the Constitutional Reform Act 2005, which confirms that under the new institutional arrangements appeals may be brought from a court in Scotland only '…if an appeal lay from that court to the House of Lords at or immediately before the commencement of this

[7] Constitutional Reform Act 2005 s 40 (3).
[8] Despite earlier apparently conclusive case law the question of Scottish criminal appeals to the House of Lords was still being raised as late as the nineteenth century: *Mackintosh v Lord Advocate* (1876) 3 R (HL) 34; (1876-77) LR 2 App Cas 41.
[9] *Magistrates of Elgin v Ministers of Elgin* (1713) Robertson 69.
[10] *HMA v Murdison* (1773) MacLaurin 557. See also *HMA v Robertson* (1717) MacLaurin 60 where a criminal appeal was lodged by the Crown but not followed through.
[11] *HMA v Murdison* (1773) MacLaurin 557, 581.
[12] *Bywater v Lord Advocate* (1781) 2 Paton 563.
[13] See e.g. *Law Hospital NHS Trust v Lord Advocate* 1996 SC 301 (IH) 311 (LP Hope).
[14] Unless there is a criminal matter which raises a devolution issue: see below at section 3.4.

section.' Therefore, because no criminal appeal lay to the House of Lords from Scotland, there cannot be Scottish criminal appeals to the United Kingdom Supreme Court.[15]

3.3 Civil appellate jurisdiction and the relative autonomy of Scots Law

The House of Lords, therefore, exercised a Scottish civil appellate jurisdiction from the 1707 Union onwards; furthermore, it also exercised a final appellate jurisdiction for England, Wales and Ireland in both civil and criminal law. In other words, the House of Lords was the court of last resort for the citizens of Great Britain and Ireland in all matters except Scottish criminal matters. However, the Union legislation had specifically provided that not only would the Court of Session and High Court of Justiciary continue to exist, but that Scottish law would also continue as a separate body of law, distinct from that of England.[16] Therefore, the Union legislation protected the existence of the Scottish legal system—courts and law—but the final civil appellate court of the Scottish system became the House of Lords, whose jurisdiction has now been assumed by the United Kingdom Supreme Court.[17] Thus, the Scottish legal system is an autonomous system within the United Kingdom, but it shares a final civil appellate institution with the other legal systems of the United Kingdom.

For a long time it was not clear whether the House of Lords, when hearing an appeal from a Scottish court, sat as a Scottish court applying Scottish law, or whether it sat as a United Kingdom court applying Scottish law. An important case which illustrates some of the historic uncertainty is *Virtue v Commissioners of Police of Alloa*,[18] more particularly in the judgment of the Lord President (Inglis):

> I think it is an error in constitutional law to represent the House of Lords as sitting at one time as a Scottish Court and at another time as English Court. That House, I apprehend, sits always in one character, as the House of Lords of the United Kingdom, and as such the Imperial Court of Appeal for the whole three parts of the United Kingdom. It has occasion to administer at one time the law of Scotland, at another the law of England, and at another the law of Ireland. But in appeals coming from all three countries it has to deal with principles of law that are common to the whole three.[19]

Following on from this pronouncement, the majority of modern commentators appear to favour the theory that the House of Lords sat as a United Kingdom court which applied Scottish law.[20] The Constitutional Reform Act, however, tends towards the

[15] There is, however, a 'devolution issue' jurisdiction which can overlap with aspects of Scottish criminal law: see below at section 3.4.
[16] Treaty of Union 1706 Art 18.
[17] Constitutional Reform Act 2005 s 40 (3).
[18] *Virtue v Commissioners of Police of Alloa* (1874) 1 R 285 (IH).
[19] *Virtue v Commissioners of Police of Alloa* (1874) 1 R 285 (IH) 296.
[20] The proper description of the court—Scottish or UK—is in many respects a semantic question, one essentially of symbolic significance. However, there are also potential practical implications with regard to the relative precedent value of the Supreme Court's decisions in Scotland. See further Appendix III.

other view, holding that the decisions of the United Kingdom Supreme Court are 'to be regarded as' decisions of a Scottish court when it hears appeals from Scotland, except if they are devolution issues.[21] This suggests that, when read properly, the section provides that the new Supreme Court should be seen as a Scottish court applying Scottish law.

The recognition that the apex court is somehow distinctly convened (whether as a distinct court, or as the one court applying a distinct law) in Scottish cases, has long been reflected in the practice of ensuring that Scottish-trained members of the court are actively involved in these cases. With the creation of Lords of Appeal in Ordinary in 1876[22] there was a Scottish Lord of Appeal in Ordinary appointed,[23] and in the early twentieth-century the modern convention that there should be two Scottish Lords of Appeal in Ordinary was established.[24]

A further complication which arises from the traditional autonomy of the Scottish legal system is the nature of the substantive law itself. Scottish law has been influenced by the laws of a number of different countries including English law, which itself has been influenced by Scottish law.[25] The different autonomous systems within the United Kingdom, therefore, may be completely separate in terms of court structures, but the different systems influence the content of each other's law. Furthermore, there are certain statutory laws which apply in each legal system of the United Kingdom, and so are in some sense shared laws, but which are applied within different legal systems.[26] There are also legislative provisions which are the same, or at least very similar, in different statutes which apply to the different legal systems.[27] This points to a tension between the high level of *formal* autonomy and the rather lower level of *substantive* autonomy of the Scottish legal system, to which we return in later chapters.[28]

Accordingly, while the Scottish legal system is clearly separate from the others within the United Kingdom, it is also the case that aspects of the law are similar across the different systems. The complicated and subtle interaction between these systems becomes important when the final appellate court sits to decide cases from Scotland. The fact that the United Kingdom Supreme Court will sit as a Scottish court may be clear; what is less clear is the extent to which and the circumstances under which it

[21] Constitutional Reform Act 2005 s 41 (2).
[22] Appellate Jurisdiction Act 1876.
[23] Lord Gordon (1876-1879). In fact the first Scottish judge raised to the peerage to assist with Scottish appeals was Lord Colonsay (1867-74); however his tenure pre-dated the formal creation of Lords of Appeal in Ordinary.
[24] See PH Brodie 'Scotland after 1707' in L Blom-Cooper B Dickson and G Drewry (eds) *The Judicial House of Lords 1876-2009* (OUP Oxford 2009) 28-29.
[25] See Chapter 2.7, and also Chapter 5.5.
[26] These statutes typically regulate matters where a UK wide approach is considered desirable by the UK government: recent prominent examples include: annual Finance Acts; Banking Act 2009; Climate Change Act 2008; Counter-Terrorism Act 2008; Human Fertilisation and Embryology Act 2008; Companies Act 2006.
[27] For example, the criminal sanction against carrying an offensive weapon in a public place, where the legislative provisions in Scotland and England are identical, but are located in different statutes: Prevention of Crime Act 1953 s 1 (b); Criminal Law (Consolidation) (Scotland) Act 1995 s 47. Another example from a quite different area of legislative policy is the Planning (Listed Buildings and Conservation Areas) Act 1990 s 1 (3), and the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 s 1 (2).
[28] See especially Chapter 4.2. See also Chapter 2.6-7.

will apply Scottish law as a distinct body of law. The matter is left imprecise by the wording of the Constitutional Reform Act 2005 where it states: 'Nothing in this Part is to affect the distinctions between the separate legal systems of the parts of the United Kingdom.'[29] This subsection can be interpreted differently; all that is absolutely certain, however, is that Scots law and the Scottish legal system retains *some* form and measure of autonomy.[30]

3.4 Devolution Issues: The Birth of a Constitutional Jurisdiction[31]

The Scotland Act 1998 provided the instrument for the implementation of devolution in Scotland by the United Kingdom Government. The 1998 Act contains the institutional arrangements for the newly devolved powers of governance, including the two key institutions of the Scottish Government and Scottish Parliament. Similar legislation laid the foundations for devolution in Wales and Northern Ireland. The legislation implementing devolution in the different parts of the United Kingdom also contained provisions setting out a legal framework which could deal with disputes concerning the operation of the newly created devolved authorities. The devolution legislation stipulated that the Judicial Committee of the Privy Council (JCPC), traditionally a court of appellate jurisdiction for various overseas legal systems with a continuing connection to the British crown, would be the court with responsibility for adjudicating disputes arising from devolution.

The JCPC derived its statutory jurisdiction[32] with regard to 'devolution issues' from the devolution legislation;[33] accordingly, the JCPC determined appeals from the Scottish legal system under this statutorily constituted jurisdiction. In turn, the United Kingdom Supreme Court derived the devolution issue jurisdiction by statutory transfer from the JCPC on 1st October 2009.[34]

This new jurisdiction created three novel and related judicial functions within the Scottish legal system: 1) judicial examination of devolved legislation beyond that of judicial review—more particularly, subjecting legislation derived from a democratically elected legislature to a competence test; 2) a further (if indirect) appeal in criminal matters above the High Court of Justiciary; and 3) an institutionally internalised human rights jurisdiction.

The most commonly litigated issue under the JCPC's devolution issue jurisdiction has been the role of the Lord Advocate. The Lord Advocate is the primary law officer in Scotland, and is the head of the Scottish prosecution service. As a result of the Scotland Act 1998, the Lord Advocate is also a member of the Scottish Executive.[35] The significance of the Lord Advocate's membership of the Scottish Executive lies within the Scotland Act s 57 (2):

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[29] Constitutional Reform Act 2005 s 41 (1).
[30] See further Appendix III.
[31] See Appendix II.
[32] *McDonald v HMA* [2008] UKPC 46 [13] (Lord Hope); *Follen v HMA* 2001 SC (PC) 105 [9].
[33] Scotland Act 1998; Government of Wales Act 1998; Northern Ireland Act 1998.
[34] Constitutional Reform Act 2005 s 40 (4) & Sch 9.
[35] Scotland Act 1998 s 44 (1) (c).

> A member of the Scottish Executive has no power to make any subordinate legislation, *or to do any other act*, so far as the legislation or act is incompatible with any of the Convention rights or with Community law.[36] (emphasis added)

The manner in which the Lord Advocate's powers are restricted by section 57 (2) has been fastened upon as a means by which broader aspects of Scottish criminal law and procedure may be reviewed. This is because if aspects of Scottish criminal law or Scottish criminal procedure are not compatible with the ECHR, any "act" of the Lord Advocate in bringing a prosecution before a court in a manner which reflects or expresses these incompatibilities may itself be taken to be in breach of section 57 (2). In turn, this broad brush interpretation of the Lord Advocate's powers and responsibilities has contributed to the growth of criminal law business in the JCPC. It is the wide-ranging effects which attach to the supervision of the Lord Advocate's role that have led to calls for an amendment which would remove the Lord Advocate from oversight under section 57 (2).[37]

Such a broad interpretative approach by the judiciary to "devolution issues" was not inevitable.[38] Yet it was established early on,[39] allowing for critical scrutiny not only of the acts of the Lord Advocate and the prosecution service but also extending to the rules and procedures of the courts in which prosecutions were brought.[40] In this way wider and more substantive aspects of Scottish criminal law have come under the purview of the Judicial Committee's jurisdiction.

The development of an expansive 'devolution issue' jurisprudence by the JCPC meant that, when coupled with the difficulty of having a dual apex court regime, and a dual human rights regime represented by the Scotland Act 1998 and the Human Rights Act

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[36] The provision is tempered to some extent by Scotland Act 1998 s 57 (3).

[37] Lord Bonomy *Improving Practice: 2002 Review of the Practices and Procedures of the High Court of Justiciary* (http://www.scotland.gov.uk/Publications/2002/12/15847/14122) [17.1]-[17.14]. The Calman Commission also considered this matter but declined to make a recommendation on the matter: Commission on Scottish Devolution *Serving Scotland Better: Scotland and the United Kingdom in the 21st Century* (Final Report 2009) [5.37]. The judges of the Court of Session also made a written submission to the Calman Commission in which they expressed dissatisfaction with the approach which had been taken by the JCPC: http://www.commissiononscottishdevolution.org.uk/uploads/2008-10-20-judiciary-in-the-court-of-session.pdf. The judges identified a number of possible solutions to the perceived problem: 1) section 57 (2) of the Scotland Act 1998 might be amended, by the Westminster Parliament, to expressly exclude the Lord Advocate; 2) the Lord Advocate might remain a member of the Scottish Executive, but the prosecution powers of the office could be transferred to a new position akin to that of the Director of Public Prosecutions, and 3) the Westminster Parliament could legislate to allow a general right of appeal in criminal matters, though such a move would be likely to be controversial. The judges specifically stated that although they had identified such possibilities they had not reached a common agreement as to which solution should be adopted, and therefore could not formally recommend one.

[38] In the very early days of the jurisdiction a more narrow approach was floated in *Montgomery v HMA* 2001 SC (PC) 1, 7 (Lord Hoffmann), but that narrower approach was overtaken by events. See A O'Neill 'Judicial Politics and the Judicial Committee: the devolution jurisprudence of the Privy Council (2001) 64 MLR 603, 607; TH Jones 'Splendid Isolation: Scottish Criminal Law, the Privy Council and the Supreme Court' 2004 Crim LR 96, 102-103.

[39] See Appendix II; A O'Neill 'Judicial Politics and the Judicial Committee: the devolution jurisprudence of the Privy Council (2001) 64 MLR 603, 607; P Ferguson and M Mackarel 'The European Convention on Human Rights and Scots Criminal Law' in A Boyle and C Himsworth et al (eds) *Human Rights and Scots Law* (Hart Publishing Oxford 2002) 307.

[40] *R v HMA* 2003 SC (PC) 21, 2003 SLT 4, [2004 1 AC 462; *Brown v Stott* 2001 SC (PC) 43, 2001 SLT 59, [2003] 1 AC 681; *Montgomery v HMA* 2001 SC (PC) 1, 2001 SLT 37, [2003] 1 AC 641.

1998, the scene was set for conflict. In a series of important cases the potential for conflict became manifest. The House of Lords and the JCPC reached differing conclusions upon the same point, and in such a way that exposed divergent approaches by the Scottish and non-Scottish judges in each case.[41]

The manner in which the law has evolved in this area, as we have seen,[42] has divided opinion. What is clear, however, is that the devolution issue arrangements for appeals and references to the JCPC have operated in a manner that was not foreseen when the new jurisdiction was introduced.[43]

3.5 Overview of the Present System

3.5.1 Final appeal in London: appeals to the Supreme Court

3.5.1.1 Civil appellate jurisdiction

The formal rules governing appeals from Scotland to the United Kingdom Supreme Court today are reasonably straightforward.[44] An appeal in civil matters[45] generally lies as of right, though there are exceptions,[46] and has been recognised by statute since the early nineteenth century.[47] The current arrangements are governed by the Court of Session Act 1988 which provides:-

> **40.— Appealable interlocutors.**
>
> (1) Subject to the provisions of any other Act restricting or excluding an appeal to the [Supreme Court] and of sections 27(5) and 32(5) of this Act, it shall be competent to appeal from the Inner House to the [Supreme Court]—

[41] *R v HMA* 2003 SC (PC) 21; *Re Attorney General's Reference (No. 2 of 2001)* [2003] UKHL 68, [2004] 2 AC 72. The conflicting approaches were reconciled in favour of that taken by the House of Lords in *Re Attorney General's Reference (No. 2 of 2001)* by *Spiers (Procurator Fiscal) v Ruddy* 2009 SC (PC) 1. See Appendix II.

[42] See n 37 above.

[43] Lord Bingham of Cornhill has stated 'One of the anomalous, and to me surprising and unexpected, results of devolution is that for the first time one does have judges, Scots prominently among them but nonetheless judges, sitting in London ruling on questions relating to Scots criminal trials' (evidence to the Parliamentary Joint Committee on Human Rights 26th March 2001: http://www.publications.parliament.uk/pa/jt200001/jtselect/jtrights/66/1032607.htm).

[44] A useful introductory summary of appeals to the House of Lords and Privy Council can be found in Lord Coulsfield and HL MacQueen (eds) *The Law of Scotland* (12th edn Thomson W Green Edinburgh 2007) [2.01]-[2.02]; whereas a more substantial description can be found at Lord Hope of Craighead 'Appeals to the House of Lords and the Privy Council' in Lord Macfadyen (ed) *Court of Session Practice* (Tottel Publishing Haywards Heath 2005) Section J; Lord Hope of Craighead 'House of Lords' in NR Whitty (ed) *SME Reissue* Civil Procedure (Law Society of Scotland Lexisnexis Butterworths Edinburgh 2007).

[45] The absence of a right of criminal appeal is clear: Criminal Procedure (Scotland) Act 1995 s 124 (2); though the devolution jurisdiction has diluted this assertion somewhat: see P Ferguson 'Privy Council Criminal Appeals' 2008 SLT (News) 133; F Raitt & P Ferguson 'Re-Configuring Scots Criminal Procedure—Seismic Shifts' (2006) 10 Edin LR 102.

[46] Lord Hope of Craighead 'Appeals to the House of Lords and the Privy Council' in Lord Macfadyen (ed) *Court of Session Practice* (Tottel Publishing 2005) Section J /3.

[47] Court of Session Act 1808 s 15; Court of Session Act 1825 s 5; Court of Session Act 1988 s 40.

(a) without the leave of the Inner House, against a judgment on the whole merits of the cause, or against an interlocutory [48] judgment where there is a difference of opinion among the judges or where the interlocutory judgment is one sustaining a dilatory defence and dismissing the action;

(b) with the leave of the Inner House, against any interlocutory judgment other than one falling within paragraph (a) above.

(2) An interlocutor of the [Inner House] granting or refusing a new trial, on an application under section 29 of this Act, shall be appealable without the leave of the [Inner House] to the [Supreme Court]; and on such an appeal the [Supreme Court] shall have the same powers as the [Inner House] had on the application and in particular the powers specified in sections 29(3) and 30(3) of this Act.

(3) It shall be incompetent to appeal to the [Supreme Court] against an interlocutor of a Lord Ordinary unless the interlocutor has been reviewed by the Inner House.

(4) On an appeal under this section all the prior interlocutors in the cause shall be submitted to the review of the [Supreme Court].[49]

Accordingly, an appeal can be brought, as of right, against a judgment of the Inner House[50] if that judgment is on the 'whole merits of the cause'. An appeal can also be brought, as of right, against an interlocutory judgment of the Inner House, if the judgment appealed against is not unanimous; or, if it is an interlocutory judgment sustaining a dilatory defence and dismissing the action, an appeal as of right also lies.[51] In simple terms, a right to appeal exists against final decisions of the Inner House, and also in cases where an interim decision is made and there is disagreement among the judges hearing the case about that decision. In any case where there might be further proceedings in the Inner House an appellant will need the leave of the Inner House to appeal, unless there was disagreement between the judges in the Inner House.

Any appeal against an interlocutory judgment not mentioned above requires the leave of the Inner House,[52] and if it should refuse to give leave to appeal, that decision is final. If an appeal is lodged with the Supreme Court from the Inner House, then the effect of that appeal is that *all* the interlocutors pronounced by the Inner House are the

[48] An 'interlocutory' judgment is a decision which makes a legal order as an interim measure before a final decision is taken based on the full merits of the case.
[49] It appears that, initially at least, the new Supreme Court will handle appeals in the same way—the only amendments to section 40 by the Constitutional Reform Act 2005 merely substitute the term 'Supreme Court' for House of Lords: Constitutional Reform Act 2005 Sch 9 (1) para 49 (5) – (6) (c).
[50] There is no provision for an appeal from an Outer House decision; the appeal must be against a decision of the Inner House: Court of Session Act 1988 s 40 (3).
[51] See Lord Hope of Craighead 'Appeals to the House of Lords and the Privy Council' in Lord Macfadyen (ed) *Court of Session Practice* (Tottel Publishing Haywards Heath 2005) Section J/4; and *Beattie v Glasgow Corporation* 1917 SC (HL) 22, 23-24 (Lord Loreburn); *Ross v Ross* 1927 SC (HL) 4; *Adelphi Hotel (Glasgow) Ltd v Walker* 1960 SC 182 (IH) *Davidson v Scottish Ministers* 2005 1 SC (HL) 1; *Beggs v Scottish Ministers* [2006] CSIH 34; 2006 SC 649.
[52] Court of Session Act 1988 s 40 (1) (b).

subject of review.[53] The only restriction,[54] beyond the statutory restrictions and exclusions,[55] upon the right to appeal against a final decision of the Inner House is the requirement that the petition of appeal must be signed by two Scottish counsel who certify the appeal is reasonable.[56] The requirement that two Scottish counsel certify the appeal as reasonable therefore operates as an alternative to a requirement for leave to appeal. In this sense the position is different from the position in England and Wales.

In England and Wales there is a leave requirement to appeal to the United Kingdom Supreme Court. The Court of Appeal may grant leave to appeal, and if they refuse the United Kingdom Supreme Court may grant leave to appeal. The United Kingdom Supreme Court will grant leave to appeal if the appeal would:

> '…raise an arguable point of law of general public importance which ought to be considered by the Supreme Court at that time, bearing in mind that the matter will already have been the subject of judicial decision and may have already been reviewed on appeal. An application which in the opinion of the Appeal panel does not raise such a point of law is refused on that ground.'[57]

The process is normally one where the application for leave to appeal is dealt with in writing without a hearing by three Justices,[58] though they will give brief reasons for refusing any decision. Thus, the lack of a formal leave to appeal requirement for Scottish appeals,[59] providing as it does a somewhat easier route for Scottish litigants

[53] Court of Session Act 1988 s 40 (4).
[54] Note also that special cases, as defined in section 27 of the Court of Session Act 1988, can be reviewed by the Supreme Court, *unless* all parties agree to exclude such review by the Supreme Court.
[55] Court of Session Act 1988 s 40 (1). There are a number of statutory variations: the Miners' Welfare Act 1952 s 17 provides that an appeal from the Inner House may only proceed to the UKSC with the leave of the Inner House; the Caravan Sites and Control of Development Act 1960 s 32 provides for appeals from the Inner House if leave is given by either the Inner House or the UKSC; appeals resulting from arbitrations under the Industry Act 1975 Sch 3 Pt II para 23 may be brought to the UKSC from the Inner House if leave is granted by either court; Aircraft and Shipbuilding Industries Act 1977 Sch 7 Pt II para 9 (2) states an appeal may be taken from the Inner House to the UKSC if leave is granted by either court; the Transport Act 1985 Sch 4 para 14 provides that the decision of the Inner House will be final in an appeal from a tribunal unless there has been a difference of opinion between the Court of Appeal and the Court of Session, in which case one of those courts may give leave to appeal to the UKSC; the New Roads and Street Works Act 1991 s 158 states that a decision of the Inner House is final unless either the Inner House or the UKSC gives leave to appeal; the Tribunals and Inquiries Act 1992 s 11 makes similar provision for leave from either court; again the Financial Services and Markets Act 2000 s 137 allows appeals with the leave of the Inner House or the UKSC; whereas, the Children Act 1995 s 51 (11) (b) states that the decision of the Inner House is final, as does the Representation of the People Act 1983 s 146 (5), and the Scottish Land Court Act 1993 s 1 (7).
[56] The Supreme Court of the United Kingdom Practice Direction 4 [4.2.2.]: http://www.supremecourt.gov.uk/docs/pd04.pdf.
[57] The Supreme Court of the United Kingdom Practice Direction 3 [3.3.3]: http://www.supremecourt.gov.uk/docs/pd03.pdf.
[58] The Supreme Court of the United Kingdom Practice Direction 3 [3.1.1]: http://www.supremecourt.gov.uk/docs/pd03.pdf.
[59] The access of an appellant to the Supreme Court might also be affected by financial requirements such as the requirement to lodge security for costs: The Supreme Court Rules 2009 Rule 36. The general provisions setting out costs and fees for appeals are set out in The Supreme Court Fees Order 2009/2131.

to the apex court than for their counterparts elsewhere in the United Kingdom, has been somewhat controversial.[60]

We should not, however, overstate the impact of the procedurally generous approach taken to the hearing of Scottish cases. In the modern era, Scottish civil appeals to the House of Lords are relatively few in number, averaging fewer than ten a year.[61] While with regard to indices such as population or even overall volume of litigation, this does not necessarily constitute an under-representation of Scottish cases before the House of Lords *relative* to other parts of the UK,[62] it nevertheless means that in *absolute* terms (and in comparison to most foreign legal systems) very few cases arising under the jurisdiction of Scots law find their way to the top court of that jurisdiction.

As for these Scottish litigants who do arrive at the apex court in London, in line with the well established historical practice[63] they are likely to be met by a court with a strong Scottish representation. Indeed, there has been no significant period of time since the late 1920s when there have been fewer than two Scottish judges in the House of Lords, and recent statistics show that they are both present and active in all cases raising distinct questions of Scots law.[64] It would however be unwise to dismiss too lightly the possibility that a new institution, with a new name and headquarters, and with the experience of many a powerful Supreme Court in the common law world to draw upon, may depart from the practices of its previous incarnation. There have been concerns that the new Supreme Court may seek to develop the law in terms which assert its 'supreme' authority.[65] Such an assertion of 'supreme' authority may be less sensitive to the constituent jurisdictions of the United Kingdom,[66] and may in turn undermine the authority of lower appellate courts.[67]

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[60] B Hale 'A Supreme Court for the United Kingdom?' (2004) 24 Leg Stud 36, 36-37; *Wilson v Jaymarke Estates Ltd* [2007] UKHL 29; 2007 SC (HL) 135.

[61] See Appendix IV. See also HL MacQueen 'Scotland and a Supreme Court for the UK?' 2003 SLT 279.

[62] An examination of the *House of Lords Judicial Statistics* (http://www.parliament.uk/business/judicial_work/judicial_statistics.cfm) reveals that between 1998 and 2006 Scottish cases disposed of by the House of Lords constituted 7.4% of all appeals (i.e. 51 out of 689), which is slightly less than the Scottish population calculated as a percentage of the UK whole (8.1%). This comparison should, however, be read in light of the fact that the Scottish business of the House of Lords is more restricted due to the absence of criminal appeals.

[63] See 3.3 above.

[64] See Appendix IV. It should be noted however that section 27 of the Constitutional Reform Act 2005 includes no guarantee of two Scottish Justices to sit in the future, despite calls for such a provision; rather, the provision states that the Supreme Court as a whole must contain expertise in Scots law.

[65] These concerns were raised before the Court's creation, but they remain current. Just before the creation of the Supreme Court a serving Lord of Appeal in Ordinary, Lord Neuberger, observed that there was a risk of 'judges arrogating to themselves greater power than they have at the moment.' http://news.bbc.co.uk/1/hi/uk/8237855.stm. Similar concerns were aired by those giving evidence to the Select Committee on the Constitutional Reform Bill: see for example Lord Rees-Mogg: http://www.publications.parliament.uk/pa/ld200304/ldselect/ldcref/125/4040608.htm. On the day that the new Supreme Court was created the British Broadcasting Corporation reported that 'One group of influential solicitors and barristers is launching a blog to monitor the Supreme Court's decision-making.' http://news.bbc.co.uk/1/hi/uk/8283939.stm. The blog is maintained by barristers from Matrix Chambers and solicitors from Olswang, and can be found at http://www.ukscblog.com/.

[66] See by way of example Lord Cullen of Whitekirk's evidence to the Select Committee on the Constitutional Reform Bill: http://www.publications.parliament.uk/pa/ld200304/ldselect/ldcref/125/4050604.htm. See also the concerns raised before the Justice 2 Committee of the Scottish Parliament which considered the

3.5.1.2 Devolution Issues

In addition to the formal regulation of the Supreme Court's civil appellate jurisdiction, it is useful to set out the devolution issue jurisdiction of the Supreme Court.[68] The legislation which underpins the devolution jurisdiction of the Supreme Court is the Scotland Act 1998. According to the terms of the legislation,[69] the Inner House of the Court of Session, or the High Court of Justiciary, may refer a devolution issue to the Supreme Court.[70] However, where the Inner House or High Court of Justiciary decide the devolution issue themselves, there is also an avenue of appeal to the Supreme Court from these determinations. In civil cases, appeal is normally[71] as of right, whereas in criminal cases, appeal is only with permission of the High Court itself, or, failing that, the Supreme Court.[72] Furthermore, the classification of a devolution issue as such is ultimately a matter for the Supreme Court, and not the High Court of Justiciary.[73] In addition to the provisions with regard to appeal and court references, there are also provisions for the law officers to refer devolution issues to the Supreme Court.[74]

Now that the United Kingdom Supreme Court has assumed the JCPC's jurisdiction in these matters, it remains to be seen if the change of court will also herald a change in approach. It seems unlikely, however, that the United Kingdom Supreme Court, with substantial continuity of membership and an identical jurisdiction, will address the key issues very differently from the JCPC, at least in the short term. Therefore the devolution issue jurisdiction, which is closely bound to human rights jurisprudence, looks set to continue to provide an avenue for a UK wide interpretation of human rights which will be applied to Scottish cases, including criminal cases. This UK wide human rights interpretative approach might also be described as one that allows for what—in the UK context at least—would constitute a novel assertion of judicial constitutionalism.[75]

Constitutional Reform Bill: http://www.scottish.parliament.uk/business/committees/justice2/reports-04/j2r04-04-01.htm.

[67] See further Chapter 4.3.

[68] The new Supreme Court takes over the Judicial Committee's devolution issue competence: Constitutional Reform Act 2005 s 40 & Sch 9. See A O'Neill 'Constitutional Reform and the UK Supreme Court—a view from Scotland' 9 (2004) Jud Rev 216; A O'Neill 'Judging Democracy: the Devolutionary Settlement and the Scottish Constitution' 8 (2004) Ed LR 177.

[69] Scotland Act 1998 s 98 Sch 6.

[70] Scotland Act 1998 s 98 Sch 6 paras 10 & 11. Except where these courts are already the subject of a referral from a lower court, in which case they must decide the devolution issue themselves.

[71] Scotland Act 1998 s 98 Sch 6 para 13; see further Appendix II

[72] Scotland Act 1998 s 98 Sch 6 paras 12 & 13. See also The Supreme Court Rules 2009 Rules 2 (1), 10 (2) and 41.

[73] *McDonald v HMA* [2008] UKPC 46 [16]-[17] Lord Hope; [49] Lord Rodger: 'All that needs to be said about that observation is that receiving or not receiving a devolution minute is a procedural step which cannot affect the jurisdiction of the Board to hear an appeal, with special leave, in a case where the appeal court has in substance determined the devolution issue in question. That jurisdiction, which is conferred by Parliament, not the appeal court, cannot be removed by any procedural decision of the appeal court. For these reasons, I am satisfied that the Board has jurisdiction to entertain the appeal.'

[74] Scotland Act 1998 ss 33 (1) & 98 Sch 6 paras 10, 11, 22, 30, 32 & 33.

[75] See further Chapter 6.7.

3.5.2 Final appeal in Scotland

3.5.2.1 Appeals to the Court of Session

It also remains open to a Division of the Inner House of the Court of Session to direct a cause to be heard by a greater number of judges[76] in certain circumstances. Such a direction may be made if there is an equal division of opinion in the Division, or if the cause raises a question of particular difficulty or importance.[77] It is also still theoretically possible for a cause to be referred to the Whole Court for consideration; in practice, however, this has not happened in recent times.[78] These procedures do not constitute a second appeal,[79] though they do provide the Court of Session with a flexible mechanism whereby it can revisit, and if necessary overrule, prior decisions of the Inner House. It also allows decisions of difficulty or importance to be accorded a more authoritative weight. In practice decisions of an enlarged bench of the Court of Session are rarely the subject of an appeal to London; yet ultimately, any such decision remains a decision of the Court of Session, and as such it can be, and indeed has been, the subject of an appeal to the Supreme Court.[80]

3.5.2.2 Appeals to the High Court of Justiciary

The High Court of Justiciary, like the Court of Session, is also a collegiate court with the power to convene a larger bench to hear appeals.[81] The Appeal Court of the High Court of Justiciary can sit as a court of three,[82] five,[83] seven,[84] and nine judges,[85] as

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[76] In a normal appeal to a Division of the Inner House, the court will sit with three judges; formerly the practice was for four judges to sit. There is a small statutory exception with regard to purely procedural matters: Court of Session Act 1988 s 5 (ba).

[77] Court of Session Act 1988 s 36. There is no numerical requirement stated, though in practice it will normally be a court of five judges, see for example: *Moore v The Scottish Daily Record and Sunday Mail* [2008] CSIH 66; *T v T* 2001 SC 337; *Cullen* v *Cullen* 2000 SC 396; *Thomas Muir (Haulage) Ltd v Secretary of State for the Environment, Transport and the Regions* 1999 SC 86; *Law Hospital NHS Trust v Lord Advocate* 1996 SC 301; *Morgan Guaranty Trust Co of New York v Lothian RC* 1995 SC 151. It was formerly the case that seven judges were *required* for cases involving a 'difficult or important matter' by virtue of the Court of Session Act 1868 s 60: *Wimpey Construction (UK) Ltd v Martin Black & Co (Wire Ropes) Ltd* 1988 SC 264; *Scottish Discount Company Limited v Blin* 1985 SC 216; *Buyers' Trustees and Nunan* 1981 SC 313; *Park v Wilsons and Clyde Coal Co* 1928 SC 121. Further, under the Court of Session Act 1868 s 59 if there was an equal split in opinion in a Division of the Inner House, on a matter of fact, or a cause which did not contain a legal question of importance, then a court of five judges would be convened—technically the court sat as the Division with the addition of 'consulted' judges. The Court of Session Act 1988 therefore merged ss 59 & 60 of the 1868 Act so that the two criteria for convening a larger bench were contained in the same section, while at the same time removing the numerical stipulations of the sections.

[78] Court of Session Act 1988 Sch 2 Pt 2, which repeals and then re-enacts section 23 of the Court of Session Act 1825.

[79] Further, while it is open to parties to submit a motion for a cause to be heard by a larger bench, there is no requirement upon the court to grant such a motion: see *William Baird & Co Ltd v Stevenson* 1907 SC 1259 (IH).

[80] In *Bell v Bell* 1940 SC 229 revd 1941 SC (HL) 5, a decision of the Whole Court, albeit a 7:6 majority decision, was overturned by a seven judge decision in the House of Lords; likewise in *Park v Wilsons and Clyde Coal Co* 1928 SC 121 revd 1929 SC (HL) 38 a majority decision of a court of seven was overturned in the House of Lords.

[81] Generally speaking in a criminal trial a single judge will sit alone, however it is competent for 'two or more' judges to preside for the whole, or any part of, a trial of difficulty or importance: Criminal Procedure (Scotland) Act 1995 s 1 (5).

[82] The quorum, and hence minimum number, for most substantive appeals is set at three judges: Criminal Procedure (Scotland) Act 1995 ss 103 (2) & 173 (1). Petitions to the *nobile officium* of the court are not subject to a statutory quorum: see *Express Newspapers plc petrs* 1999 JC 176.

[83] *Ahmed v HM Advocate* [2009] HCJAC 73; *MacAngus v HM Advocate* [2009] HCJAC 8.

well as sitting as a Whole Court.[86] The High Court of Justiciary was not subject to the numerical stipulations which historically applied to the Court of Session;[87] nevertheless, the Appeal Court of the High Court of Justiciary does convene larger benches in order to overrule the decision of another large bench court. Therefore, an unsatisfactory decision of a bench of five judges will be reviewed by a bench of seven judges;[88] an unsatisfactory decision of a bench of seven judges will require a court of nine judges to overrule it,[89] and so on. It remains an unanswered question whether a decision of the Whole Court can be overruled by a decision of a subsequent Whole Court.[90]

Further, as we have seen[91] there is no appeal in criminal matters from the High Court of Justiciary to the Supreme Court. This might explain why in modern times the High Court of Justiciary has exercised this power more frequently than the Court of Session,[92] since the lack of a corrective further appeal makes precedent management within the High Court of Justiciary a necessity. Yet, despite this power to convene a larger bench to consider prior decisions, it remains the case that there is only a single appeal open to an appellant;[93] a position which may be contrasted with the position in civil matters, where there can be as many as three appeals.[94] Finally, while an appellant can submit a motion requesting that a larger bench be convened such a motion is no more than a request, and the appellant cannot insist upon a larger bench.

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[84] *Leggate v HMA* 1988 JC 127; *Brennan v HMA* 1977 JC 38; *Mitchell v Morrison* 1938 JC 64.
[85] *McCutcheon v HMA* 2002 SCCR 101; *Smith of Maddiston Ltd v Macnab* 1975 JC 48.
[86] *Sugden v HMA* 1934 JC 103.
[87] See n 73 above.
[88] *Brennan v HMA* 1977 JC 38.
[89] *McCutcheon v HMA* 2002 SLT 27.
[90] See G Maher and TB Smith 'Judicial Precedent' in TB Smith (ed) *The Laws of Scotland* (Law Society of Scotland Butterworths 1987) Vol 22 [308]-[309]; DJ Dickson and AD Vannet 'Criminal Procedure: Second Reissue' in NR Whitty (ed) *The Laws of Scotland* (LexisNexis Law Society of Scotland 2008); J Chalmers 'How (not) to reform the law of rape' (2002) 6 Edin LR 388.
[91] See Chapter 3.2.
[92] See for recent examples: *Ahmed v HM Advocate* [2009] HCJAC 73; *MacAngus v HM Advocate* [2009] HCJAC 8; *Dickson v HM Advocate* [2007] HCJAC 65; *Robertson v HM Advocate* [2007] HCJAC 63; *Early v HM Advocate* [2006] HCJAC 65; *Fleming v HM Advocate* [2006] HCJAC 64; *Hendry v HM Advocate* [2006] HCJAC 14.
[93] There is however the possibility of a reference from the Scottish Criminal Cases Review Commission, which reviews convictions and may refer cases to the High Court of Justiciary for further consideration: see Criminal Procedure (Scotland) Act 1995 Part XA.
[94] A civil decision of a Sheriff might be the subject of an appeal to the Sheriff Principal, and thereafter to the Inner House, and ultimately to the Supreme Court. For an accessible introduction to the civil court system: Lord Gill *Report of the Scottish Civil Courts Review* (Scottish Civil Courts Review 2009) Chapter 3.

Chapter Four: Comparative Perspectives

4.1 Introduction

In every state of the world there exists a court system, and within that court system there is a hierarchy of courts and a site or sites of final appeal. The ways in which a state's court system may be organised are quite varied. In addition, the court system will complement the other organs of government, which themselves will be arranged following different models.[1]

In the present chapter, we concentrate on two aspects of comparative constitutional design and practice most relevant to our inquiry. The first concerns the relationship between different levels of legal and judicial authority within a federal or otherwise decentralized state. We ask how the organisation of the legal and judicial appellate system in the Scottish part of the Union state compares to the organisation of the legal and judicial appellate system at the regional level of federal systems. The second comparative dimension concerns the functional organisation of the final appellate jurisdiction in a state. The basic functional division lies between the generalist Supreme Court model of the common law world and the more specialist division of high judicial authority of the civilian model. Our key question here concerns the extent to which and the manner in which the evolving United Kingdom and Scottish arrangements continue to conform to (or depart from) the common law type with which they have been so closely historically associated.

In other words, we want to examine from a comparative perspective two key *axes of variation* within the organisation of a system of courts and of appellate mechanisms that are relevant to our understanding of the Scottish case. The first axis of variation concerns the degree of (de)centralization within the legal and political order in general and within the appellate court system in particular. Is the court system organized as an integrated whole within the polity, or is there a measure of decentralized distribution of courts and of final appellate authority? We may think of this, spatially, as the *vertical axis* of variation, mapping as it does the extent to which the legal and appellate court system is organised by reference to different territorial 'levels' of constitutional authority and institutional design. The second axis of variation concerns the degree of specialization and differentiation of function within the appellate structure. Is there a single apex court at the top of the appellate structure, or are there multiple such courts reflecting a degree of functional specialization 'all the way up' within the court system? We may think of this, spatially, as the *horizontal axis* of variation, mapping as it does the degree of differentiation and organisation by reference to subject-matter in the appellate court structure situated at the central level

[1] For comparative analysis and various typologies see generally: M Tushnet 'Comparative Constitutional Law' in M Reimann and R Zimmermann (eds) *The Oxford Handbook of Comparative Law* (OUP Oxford 2006); RL Watts *Comparing Federal Systems* (2nd edn McGill-Queen's University Press Montreal 1999); J Bell *Judiciaries within Europe: A Comparative Review* (CUP 2006); N Dorsen, M Rosenfeld, A Sajó and S Baer (eds) *Comparative Constitutionalism: Cases and Materials* (Thomson West St Paul Minnesota 2003); H Patrick Glenn 'Divided Justice? Judicial Structures in Federal and Confederal States' (1994-95) 46 South Carolina L Rev 819.

of the polity, rather than the relationship between courts and appellate mechanism located at different levels of the polity.

If we look at these two axes together, we are able to represent different models of final appellate jurisdiction in terms of a matrix. Later in the Chapter, we portray this variation in diagrammatic form, producing four archetypes of final appellate jurisdiction; namely the decentralized, generalist type (e.g. United States); the decentralized, specialist type (e.g. Germany); the centralized, generalist type (e.g. Republic of Ireland) and the centralized, specialist type (e.g. France) (see **Table One**).

These axes of variation speak to the three key distinguishing features and associated tensions of the Scottish case. The vertical axis recalls the importance of territorial distribution and of different levels of jurisdiction in the Scottish context, which is part and parcel of the broader tension of the relationship between part and whole in the United Kingdom. By looking at the ways in which courts of final decision in other states deal with business from different regionalised court structures, we gain a comparative perspective on the complex, highly variable and sometimes conflicted relationship between decentralized or distributed authority as a general constitutional phenomenon and the particular matter of appellate structure. The horizontal axis recalls the other two tensions that are key to the Scottish experience of final appellate jurisdiction. The different treatment of civil and criminal law in the Scottish context on the one hand, and the historical fusion of ordinary and constitutional jurisdiction on the other, both speak to the question of the scope and division of final appellate jurisdiction, and may usefully be compared with the many other ways, themselves often also the subject of critical scrutiny in their host jurisdictions, of pooling or dividing final appellate jurisdiction by subject-matter within the polity. By looking at how other states organise themselves in terms of these two axes, therefore, we seek to gain greater insight into what is general and what is particular about the Scottish case and about the difficulties it has experienced and the criticisms it has received, and also to begin to appreciate how its appellate jurisdiction might be organised differently.

4.2 The vertical axis; decentralisation and jurisdictional autonomy

Each state of the world may be located along a continuum between a high level of centralisation of all organs of government—legislative, executive and judicial, and a highly decentralized or distributed model in which there is considerable regional strength and autonomy of all three organs. As already noted,[2] the model of government viewed as paradigmatic of decentralization is a federal one. A properly federal state is one in which legal authority is divided between the centre and regional levels in a manner that cannot be overridden or unilaterally changed by either level. There are, however, some variations or modifications of the federal model on the continuum of decentralization, where considerable power is dispersed but where ultimate legal authority or sovereignty remains with central institutions.

As set out in Chapter Two, the United Kingdom represents one such variation on the theme of decentralization. The United Kingdom is not a federal state in that the devolved authority reposed in Scotland, Wales and Northern Ireland is not, legally speaking, final authority—the central authorities of the United Kingdom retain the

[2] See Chapter 2.

ability to legislate in any part of the United Kingdom, and indeed on any subject. The authority that is exercised by the Scottish Parliament is instead devolved to it by the central authority in Westminster.[3] This is an inevitable consequence of the resilience of the central constitutional principle of the sovereignty of the United Kingdom's Parliament. Rather than as a federal state, we have argued that the United Kingdom is better viewed as a Union state; one made up of different national entities which remain (variably) distinct in law, culture and politics notwithstanding the lack of a constitutional federal guarantee.

A state which has an institutional model based upon some form of decentralized distribution of authority, whether or not properly federal so called, will typically have a court system and appellate structure which reflects such decentralization. In fact, it is probably more accurate in such a situation to speak in the plural—to talk about a number of different court systems, and a number of different legal orders which they will administer. These different regionalised arrangements can be defined with reference to two closely related, yet distinct, understandings of autonomous legal organisation.[4] The first understanding of autonomy may be described as *system autonomy*. This describes the separate regional machinery of state that relates to a regional legal order. Important constituents of *system autonomy* include the extent to which the administration, political accountability and judicial appointment and discipline procedures for regionalised court structures are themselves regionally authorised and located. *System autonomy* therefore, refers to the extent to which a regional legal order is reflected in and complemented by regionalised political institutions.

The second form of autonomy may be described as *jurisdictional autonomy*. This is a narrower understanding of autonomy, but for us the more immediately relevant one. *Jurisdictional autonomy* is the extent to which judicial competence and authority may be regarded as autonomous from judicial competence and authority situated at other levels of the polity; shortly put, it refers to the extent to which and the degree of finality with which regional laws, as applied by regional courts, may frame a factual matter at issue and provide for its authoritative resolution. It is apparent, therefore, that *system* and *jurisdictional* autonomy need not closely correspond, though they often will.[5] In particular, it is possible and reasonably common to have a high level of jurisdictional autonomy in combination with a low system autonomy.[6]

To understand the probable terms and limits of jurisdictional autonomy at lower territorial levels of the polity, we need to appreciate the way in which law is diversely sourced in a state expressing or tending towards a federal model of organisation. A

[3] A point which has been judicially emphasized; see *Whaley v Lord Watson* 2000 SC 340 (IH) 348-49 (LP Rodger).

[4] See E Casanas Adams 'Judicial Federalism from a comparative perspective: Spain, the United States, and the United Kingdom' (PHD Thesis EUI 2009).

[5] So for example the United States provides an example of a country that possesses *system* autonomy which is closely matched by *jurisdictional* autonomy insofar as each State has a state court system in which the law of that State is administered. A similar alignment of *system* and *jurisdictional* autonomy exists in other countries which are traditionally considered as properly federal such as Canada, Germany and Australia.

[6] In Spain, for example, in the Autonomous Regions there is a strong concept of *jurisdictional* autonomy in certain areas of law, even though there is no strong framework of *system* autonomy. It is also possible to have a situation where there is a high *system* autonomy, but not a strong *jurisdictional* autonomy, such as in South Africa.

state which is structured on a federal basis will typically have three conceptually and institutionally separate streams of law. These three streams of law are *regional law*, *federal law*, and *constitutional law*. *Regional law* is the law which is created within that regional unit, and it will normally be determined in *regional* courts. *Federal law* on the other hand is law which is created centrally, and will often be administered through a centralised *federal* court system. Thirdly, and finally there is *constitutional law*, which in the federal context consists of the body of higher law which settles the division of competences between the centre and the regions of a state and the procedural rules that govern the interactions between the centre and the regions, as well as supplying certain substantive rules (e.g. fundamental rights) that bind and constrain both levels of government.

Typically, the jurisdictional autonomy of the regional unit in a federal state extends to the regional stream of law but not beyond.[7] In the federal United States of America (USA), for example, each state has its own internal court structure, which is complemented by a federal court structure itself organised so as to derive its jurisdiction from a federal subject matter. These court structures, therefore, are organised with reference to both geography and subject matter. Importantly, the internal courts of each State will have the final and exclusive word on matters of state or *regional law*, unless the matter has a *federal* or *constitutional* dimension. This *jurisdictional autonomy* which pertains to the individual states of the USA is matched and underpinned by a fairly comprehensive *system autonomy*. However, the *jurisdictional autonomy* of each state is mitigated by the existence of a *federal* stream of law which deals with federal matters as well as an overarching *constitutional* stream. In other words, it is a regional jurisdictional autonomy that is neither unlimited (because of federal competences) nor absolute within its domain (because of constitutional considerations).[8]

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[7] There are some cases where, as well as having full autonomy in regional law, the regional part might also have some form of federal jurisdiction: however, they will not have the last word on that federal jurisdiction. In Canada for example, the provincial superior courts have jurisdiction over a wide range of *federal* laws, and although federal courts exist they have a less extensive role than those of the United States or Australia. However, at the final appellate level, the Supreme Court of Canada, as an apex court, can hear appeals from both provincial superior courts and federal courts; whereas the United States Supreme Court does not have a general jurisdiction to hear appeals from state courts. See HA Johnson 'A Brief History of Canadian Federal Jurisdiction' (1994-1995) 46 South Carolina L Rev 761. In Australia there is a highly complex interaction of *federal* and *regional* laws and courts—in some instances the state courts will have concurrent jurisdiction in matters of *federal* law, whereas in other areas federal courts will have exclusive jurisdiction. Further, the nature of the High Court of Australia as an apex court, with a general jurisdiction to hear appeals from both federal and state courts on both federal and state law, provides a single final court with a unifying function with respect to the interpretation of law in Australia, much like that of the Canadian Supreme Court. See BR Opeskin 'Federal Jurisdiction in Australian Courts: Policies and Perspectives' (1994-95) 46 South Carolina L Rev 765.

[8] Just as the autonomy of regional jurisdiction varies, so too the extent to which a *federal* stream of law is protected by a separate federal court structure also varies between different federal states. In Germany, for example, there is a strong recognition of a federal stream of law in the various specialist *federal* courts which sit at the top of the different specialist streams of law: see n 23 below. These *federal* courts include the *Bundesgerichtshof* (Federal Court of Justice) which sits at the top of the ordinary jurisdiction courts; the *Bundespatentgericht* (Federal Patent Court), which is a special federal court associated with the ordinary jurisdiction stream, but is not part of a hierarchy insofar as it only appears at a federal level; the *Bundesverwaltungsgericht* (Federal Administrative Court) which heads the administrative stream of law; the *Bundesarbeitsgericht* (Federal Employment Court) which heads the specialist employment courts hierarchy; the *Bundessozialgericht* (Federal Social

The federal model of government, then, is one that is dominated by the *dual* order of federal and regional law (and supplemented by a third and organizing order of constitutional law), with consequential provision of jurisdictional autonomy for the regions in respect of their self-sourced laws. This federal model can usefully be distinguished from two other models. On the one hand, and very commonly, it is distinguished from a unitary model. In a *unitary system* there is only a single level and order of law (although—as we shall see at 4.3 below—the unitary system like any other legal system will contain a number of functional sub-types, will normally also embrace a clear distinction between ordinary and constitutional law, and these various sub-divisions may or may not be recognized in separate systems of courts and appellate chains).

On the other hand, the federal model, with its modest jurisdictional autonomy, may also be contrasted with a *pluralist* model. In a pluralist model, there is neither a single order of law for the entire polity nor a dual order of federal and regional law, the former of which embraces the entire polity. Rather, in a pluralist model there is no pan-polity order of law at all, but just the mutually exclusive laws and corresponding legal systems and court and appellate structures of the regional parts.

This distinction between pluralism and federalism takes us to one of the key defining features of the Scottish and United Kingdom arrangements. It would be quite wrong to describe the United Kingdom as a unitary system, as there are separate legal systems and court structures, and, underscoring these, separately identifiable legal orders (Scots law, English law and Northern Irish law), in the different constituent parts of the United Kingdom. Yet, nor can the United Kingdom be said to have a formally dual system as there is no UK 'federal' law and no 'UK court' hierarchy, leaving aside for the moment the limited constitutional speciality of the devolution issue jurisdiction. Rather, the United Kingdom is an instance—unique among states and their 'official' legal systems—of internal pluralism.[9]

Court) which is at the head of the social stream of law, and the *Bundesfinanzhof* (Federal Revenue Court) which sits at the head of the revenue stream of law. These federal courts at the head of the specialist streams of law are charged with ensuring common development of legal principles at a national level, and there is a common body composed of the presidents of the respective federal courts called the *Gemeinsamer Senat* which is supposed to ensure harmonious legal development between the federal courts. On the other hand, in Canada, there is not as pronounced a system of federal courts, though they do exist; rather, much federal law can be dealt with in provincial courts, so long as the province assigns such a federal jurisdiction to the provincial court system under section 92 (14) of the Constitution Act 1867. In Australia, the position is broadly similar insofar as state courts have reasonably wide-ranging federal competences: see n 7 above.

[9] Two qualifications should be made here. First, if we include 'unofficial' forms of law, i.e. systems that are nor recognized as of equal authority to other constitutionally recognised sources within the official constitutional framework of the state but which are nevertheless culturally powerful legal forms (e.g. aboriginal law, religious law), then there are many more cases of internal pluralism. See for Example J Tully *Strange multiplicity: constitutionalism in an age of diversity* (CUP Cambridge 1996). Secondly, if we extend our perspective to a supranational entity such as the European Union, then arguably the relationship between its supranational law and court system on the one hand and the legal and court systems of the member states can also be represented as one of pluralism, although the bridging mechanisms between the different (state and supranational) streams are much more systematic than in the case of the internal pluralism of the United Kingdom. See e.g. N MacCormick *Questioning Sovereignty* (OUP Oxford 1999); N Walker 'The Idea of Constitutional Pluralism' (2002) 65 MLR 317.

Such pluralism has important consequences for both system autonomy and—even more so—jurisdictional autonomy. In the case of Scotland, there is a fairly high degree of *system autonomy*. In particular, the devolution of legislative competence in legal system matters to the Scottish Parliament under the Scotland Act, has led to a spate of recent legislative activity on the Scottish legal profession and court system.[10] However, this has merely served to reinforce a distinctive system identity whose roots lie in Scotland's sovereign pre-Union polity.

The contemporary pluralism of underlying legal orders is also the legacy of pre-Union political and legal independence, and it is this deeper vein of pluralism that is directly responsible for the expansive terms of Scotland's *jurisdictional autonomy*. Formally speaking, indeed, it necessarily follows from legal order pluralism that Scots law possesses jurisdictional autonomy that is exhaustive in scope—and, therefore, far greater than that of any regional unit within any strictly federal system. Thus, any matter which arises within the territorial boundaries of Scotland is a matter for the Scottish court system, to be determined according to Scottish law.[11] Further, as we have seen, the Supreme Court, like the House of Lords before it, effectively sits as a court of Scots law in Scottish cases,[12] and there is a well-developed practice of ensuring that the Scottish members of the Court, of which in recent years there have invariably been at least two, will sit in the vast majority of Scottish cases.[13]

Yet, however pure in conception and 'hard' in theory, how that formal jurisdictional autonomy operates in practice is less straightforward. As noted above, there are no dedicated federal or constitutional courts in the United Kingdom, the closest thing being the very specific "devolution issue" jurisdiction of the United Kingdom Supreme Court. However, there are a number of statutes which apply laws across the United Kingdom, and hence across the different legal systems of the United Kingdom. These statutes often pertain to matters upon which it is considered desirable by successive UK governments on general public policy grounds to have a consistent United Kingdom wide approach—such as, for example, taxation or commercial law. Furthermore, the United Kingdom's obligations under European Union law[14] require there to be equivalent application of supranational legal norms across the United Kingdom's various internal jurisdictions, and often this will be achieved by the transposition of European directives or similar instruments into domestic law by common legislative means. Formally, the application of common legislation in Scotland in all cases, whether derived from UK domestic public policy, from EU law

[10] Judiciary and Courts (Scotland) Act 2008; Legal Profession and Legal Aid (Scotland) Act 2007; Senior Judiciary (Vacancies and Incapacity) (Scotland) Act 2006 (repealed).
[11] Furthermore, there is no division of court structures *within* the Scottish system according to subject matter, except that of the distinction between criminal and civil law. There are, however, elements of specialisation in the Scottish legal system, and these would be reinforced by the recommendations of the *Report of the Scottish Civil Courts Review*. The review proposes a specialist personal injury sheriff court in Edinburgh, and further recommends that sheriffs in individual sheriffdoms should be designated as specialists in certain subjects, including: crime, general civil, personal injury, family, and commercial. In summary form, see Lord Gill *Report of the Scottish Civil Courts Review* (Scottish Civil Courts Review 2009) [36] & [40]-[41].
[12] Indeed, this appears to have been reinforced by the statutory framework of the new Supreme Court. See Chapter 3.3.
[13] See Chapter 3.5.
[14] European Communities Act 1972.

or indeed from another of the UK's international obligations,[15] remains a decision upon Scottish law by a Scottish court. However, because of these various pressures towards convergence, often the court will look to interpretations of the legislation from across the United Kingdom. Beyond this common approach to UK wide statutes, the courts of the United Kingdom will often also look towards each other on other questions of overlapping law and policy even where the statutory backgrounds are not identical or the matter is governed by common law. This commonality of horizons, moreover, is reinforced at the highest level by the fact that all the judges of the new Supreme Court, regardless of the jurisdiction in which they were originally trained, are eligible to hear—and frequently do in fact hear—cases from all jurisdictions.

The realities behind the hard formal *jurisdictional autonomy* accorded to Scottish courts, and the exclusively Scottish law they apply, are therefore complicated within the Union state. The formal autonomy of Scottish law is undeniably more comprehensive than any other regional, sub-state system in the world. The fact that the United Kingdom Supreme Court has no direct jurisdiction over Scots criminal cases and that even in civil matters it applies strictly Scots law, speaks to the, formally, entirely separate integrity of the Scottish court system as a key component of that underlying legal order autonomy. What is more, the hard *jurisdictional autonomy* is reinforced by and to some extent relates symbiotically to the *system autonomy* which Scotland enjoys;[16] though, one should note that the *jurisdictional autonomy* is stronger than the *system autonomy*, in the sense that the Scottish courts and Scottish law comprehend both central and regional sources of authorisation within the constitutional arrangements of the Union state.

But, as we have seen, the formal *jurisdictional autonomy* of Scotland and its court system harbours many substantive overlaps and commonalities. Importantly, the very form/substance distinction that is thereby opened up, and the opposing mindsets and institutional possibilities that this encourages, has itself often operated as a kind of ideological fault-line—an impediment to serious and systematic reflection on the

[15] Traditionally the United Kingdom is generally considered to be a dualist as opposed to a monist state; that is to say, rules of international law, and international treaties entered into by Her Majesty's Government, do not have direct effect. Such rules are not automatically incorporated into domestic law—some form of domestic legislation is required: *R v Secretary of State for the Home Department Ex parte Brind* [1991] 1 AC 696 (HL); *R v Lyons* [2003] 1 AC 976 (HL). In the case of unincorporated international norms there is also a strong presumption that domestic law shall be interpreted in a conform manner, although this presumption took considerably longer to crystallize in Scotland than it did in England: *Kaur v Lord Advocate* 1980 SC 319; *T Petr* 1997 SLT 724. A more difficult question is the extent to which customary international law forms a part of domestic law; recently, however, the view has been expressed that customary international law operates as a normative influence upon the development of domestic common law, but is not *per se* incorporated into domestic common law: for discussion of this trend see P Sales and J Clement 'International law in domestic courts: the developing framework' (2008) 124 LQR 388. It is also open to the United Kingdom under international law to permit a right of access to international tribunals. This, for example, was the reason why British citizens could—prior to the Human Rights Act 1998, which effectively incorporates the European Convention on Human rights into domestic law—seek redress under the European Convention on Human Rights at the European Court of Human Rights in Strasbourg after domestic avenues had been exhausted, a last resort mechanism that remains available today.

[16] Clearly the jurisdictional autonomy of Scots law is more likely to be respected and protected where strong institutions exist for the functioning of Scots law and the articulation of its interests, as is more emphatically the case under the devolved settlement of the Scotland Act 1998 than previously. Conversely, the preservation and development of such strong institutions is more easily justified to the extent that they represent, and are widely understood to represent, an autonomous legal order.

proper influences and direction of Scots law in the Union state. On the one hand, just because the formal position is categorically distinct, the significance of substantive overlap and commonality, and the quasi-federal and constitutional issues it raises, may often be obscured from the standpoint of a certain kind of Scottish legal nationalism.[17] The formal position, from that perspective, can be too easily mistaken for the substantive reality, and the comprehensive autonomy of Scots law and adjudication treated as the system's default purpose and trajectory. On the other hand, just because the substantive pressures towards commonality are so insistent, the significance of the formal position is often obscured. Conversely, then, from a certain type of UK-centred (often *Anglo*centric) standpoint, the substantive trends can be too easily mistaken for the formal position—or at least treated as cause for dismissing the formal position—and the gradual convergence of Scots law into a common British law treated as the system's default purpose and trajectory.[18] The form/substance distinction, therefore, as we seek to capture in the contrast set out in **Tables Two, Three** and **Four** below, creates a *zone of uncertainty* in the appreciation of the nature and the limits of Scots jurisdictional autonomy. Within that zone we find at worst a division of perspectives and at least differing emphases over the relative prominence to be given to the distinctly Scottish and general UK strains of law.[19] This is in contrast with many federal systems where differences are likely to be expressed and contestation take place at the margins of a more clearly settled jurisdictional boundary.

4.3 The horizontal axis; the scope and division of jurisdiction for a top court

In considering the jurisdictional scope of top courts, it is possible to draw a rough line between the approaches of the common law[20] and the civil law[21] traditions.

The common law tradition tends to favour an apex court; that is to say, it favours a single final court which considers appeals on any subject matter. This reflects a traditional reluctance within the common law to distinguish between different streams of law, a reluctance which could also be measured in the scarcity of specialist first instance courts to administer any such laws. However, while there used to be a

[17] For discussion of the variants of Scottish legal nationalism see HL MacQueen 'Legal Nationalism: Lord Cooper, legal history and comparative law' (2005) 9 Edin LR 395; HL MacQueen 'Two Toms and an Ideology for Scots Law: T B Smith and Lord Cooper of Culross' in E Reid and DL Carey Miller *A Mixed Legal System in Transition: T. B. Smith and the Progress of Scots Law* (Edinburgh University Press Edinburgh 2005). On the modern history of Scottish legal nationalism see L Farmer 'Under the Shadow of Parliament House: The Strange Case of Legal Nationalism' in L Farmer and S Veitch (eds) *The State of Scots Law: Law and Government After the Devolution Settlement* (Butterworths Edinburgh 2001); see, more generally the references at Chapter 5.4 n 15.

[18] See discussion in Chapter 5.5-6, and Chapter 6.3.1 n 22.

[19] These differing perspectives emerge not only in the academic literature and in professional and political culture, but also in the nuances of judicial development of the law. This is perhaps most apparent as regards the longstanding question of the identity of the House of Lords as a single UK court or as a variety of separate jurisdictional courts. This is discussed at length in Appendix III, and also in Chapter 3.3.

[20] 'Common law' is used here as a rough description of the legal systems of nations heavily influenced by the English common law.

[21] 'Civil law' is used here a rough description of the legal systems of continental Europe and beyond whose approaches are characterised by heavy use of the civilian tradition of law.

tradition against specialisation, to revert briefly to the significance of the vertical axis it is more common to see limitations upon the jurisdiction of top courts within the common law tradition on account of federal considerations. In some cases, as we have seen, the top court has limited jurisdiction with respect to *regional law*, though in almost all cases it will have jurisdiction in *federal* and *constitutional* matters.

Within the civil law family there is a greater tradition of specialisation by subject-matter. There is typically no single apex court with a comprehensive jurisdiction to hear cases on all subjects; rather there are multiple hierarchies of court systems based upon specialisation, and at the head of each hierarchy of specialist courts there is a specialist top court. This model of functional specialization can be found with or without the additional jurisdictional divisions attendant upon a federal organization of the state. In France, for example, there is no division of jurisdiction ordered according to a decentralised or regionalist model, but there are different court structures which are organised according to specialisations of subject matter (see **Table One**).[22] In Germany, by contrast, there are also a number of top courts at the head of different specialist court structures,[23] and no single court to which all cases may be appealed,[24] but in this case functional specialization is accompanied by a federal distribution of jurisdiction (see **Table One**).

A further—and reinforcing—distinction between the common law and civil law traditions concerns constitutional jurisdiction. In the European civilian context, it is common to find constitutional courts with a special constitutional jurisdiction, though these differ greatly in form.[25] A specialist constitutional court has a jurisdiction relating exclusively to the constitution, though that will also normally mean that an appeal can be brought or a matter referred from any other court if some aspect of constitutional law has been engaged. In contrast, in the common law tradition the constitutional jurisdiction, reflecting the English roots of the common law family, tends not to be clearly separated out from ordinary, non-constitutional law. Rather, underlining the tendency towards non-specialist jurisdiction, constitutional questions tend to be just one more aspect of the general and comprehensive jurisdiction of a Supreme Court. This trend applies generally, both in unitary common law states such

[22] Therefore in France there are a number of specialist courts or court like institutions: the *Conseil Constitutionnel* (which functions like a constitutional court in some respects); the *Conseil d'Etat* (which operates as a kind of supervisory administrative court, but it retains a limited appellate authority as well as a limited advisory jurisdiction with respect to references from other courts). See J Bell S Boyron and S Whittaker *Principles of French Law* (2nd edn OUP 1998).

[23] In Germany there are a number of different streams of specialist courts, for example: *Ordentliche Gerichte* (courts of ordinary jurisdiction); *Finanzgerichte* (revenue courts); *Sozialgerichte* (social courts); *Arbeitsgerichte* (employment courts); *Verwaltungsgerichte* (administrative courts). There is a specialist federal appeal court at the top of each of these specialist hierarchies. See further n 8 above.

[24] There is something of an exception with the Constitutional Court, on which see n 25 below.

[25] These differences can be seen in the review procedures which are utilised by the different European constitutional courts. In France for example, legislation can be the subject of abstract review by the *Conseil Constitutionnel*—this means that legislation can be scrutinised to ensure it is constitutionally proper before it enters into force. In Germany, there is provision for both abstract and concrete review; in the case of concrete review the scrutiny is carried out in the context of a live court case considering the constitutionality of a provision which is then in force. In Spain and Italy similar procedures of both concrete and abstract review are available.

as Ireland[26] (see **Table One**) and federal common law states such as the United States or Canada (see **Table One**).

Exceptionally, however, even in states with a common law heritage one will find a constitutional court, as in the new post-apartheid South Africa. Read differently, therefore, the overall trend may be a common historical one rather than a family-specific one. The specialist constitutional courts, including the new South African court, are typically a phenomenon of the 20th and 21st centuries as much as they are products of the civilian tradition, while the generalist Supreme Courts are typically creatures of the 18th and 19th centuries as much as they are products of the common law tradition.[27]

A final variation on the theme of appellate specialization is more subtle. It refers not to the number and type of different specialist courts and appellate chains, but to the internal organisation of top courts. Therefore, in some countries the internal organisation of an appellate court will be arranged into chambers of different speciality. Of particular relevance to the instant case, this may apply with reference to the civil/criminal divide, as in the examples of Spain and France.[28]

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[26] In Ireland the Supreme Court operates as an apex court in that it has a general and comprehensive civil, and a limited criminal, jurisdiction in addition to a constitutional abstract review competence. The criminal jurisdiction of the Supreme Court is limited to cases which are referred to it by the Court of Criminal Appeal, the Attorney General, or the Director of Public Prosecutions on the basis that it raises a point of exceptional public importance. The Attorney General can also make a reference for an abstract decision on a criminal matter [like the Lord Advocate (Criminal Procedure (Scotland) Act 1995 s 123) and the English Attorney General (Criminal Justice Act 1972 s 36)] in accordance with section 34 of the (Irish) Criminal Procedure Act 1967. The Supreme Court can also hear criminal appeals which relate to a provision of the Irish Constitution.

[27] See A Stone Sweet *Governing with Judges: Constitutional Politics in Europe* (OUP 2000) 32 *et seq*, where the author sets out the development of constitutional courts following the so-called 'Kelsenian model', a reference to the model court developed by Hans Kelsen for Austria in the early 20th century.

[28] In France the *Cour de Cassation* is split into six different chambers, one of which, the *Chambre criminelle* is specifically reserved for criminal business. The Spanish *Tribunal Supremo* is arranged according to specialist chambers, including one which handles criminal business. In Germany the *Bundesgerichtshof* is split into specialist senates, five of which deal with criminal matters. One can also see a distinctive treatment of criminal matters, in a common law context, in the restrictions upon the right to appeal to the Supreme Court in Ireland: see above at n 26. In England and Wales, there are similar restrictions upon rights to appeal to the Supreme Court in criminal matters: Criminal Appeals Act 1968 s 33; Administration of Justice Act 1960 s 1. Criminal Appeals from Northern Ireland are also subject to similar restrictions: Judicature (Northern Ireland) Act 1978 s 41. Furthermore, it may also be that specialist sensitivities are reflected in practices concerning representation of a subject within the judicial staff of a top court. Indeed, as part of the appointment process of Justices of the United Kingdom Supreme Court there is a statutory requirement that the appointing commission should take account of the fact that the court taken as a whole must have knowledge of and experience of practice in the law of each part of the United Kingdom: Constitutional Reform Act s 27 (8). In addition to this requirement which ensures *regional* expertise, it may also be the case that specialist knowledge will be considered when making such an appointment. In particular, a good distribution of judicial expertise by subject-matter might be secured by virtue of section 27 (9) of the Constitutional Reform Act 2005, which stipulates that 'The commission must have regard to any guidance given by the Lord Chancellor as to matters to be taken into account (subject to any other provision of this Act) in making a selection.' It is the case that areas of specialist expertise are taken into consideration when composing the panel of judges which will hear a case in the United Kingdom Supreme Court: A Le Seur *A Report on Six Seminars About the UK Supreme Court* (Queen Mary University of London, School of Law Legal Studies Research Paper No 1 of 2008) 25-26.

Table 1: Comparative approaches- Four Paradigm Cases

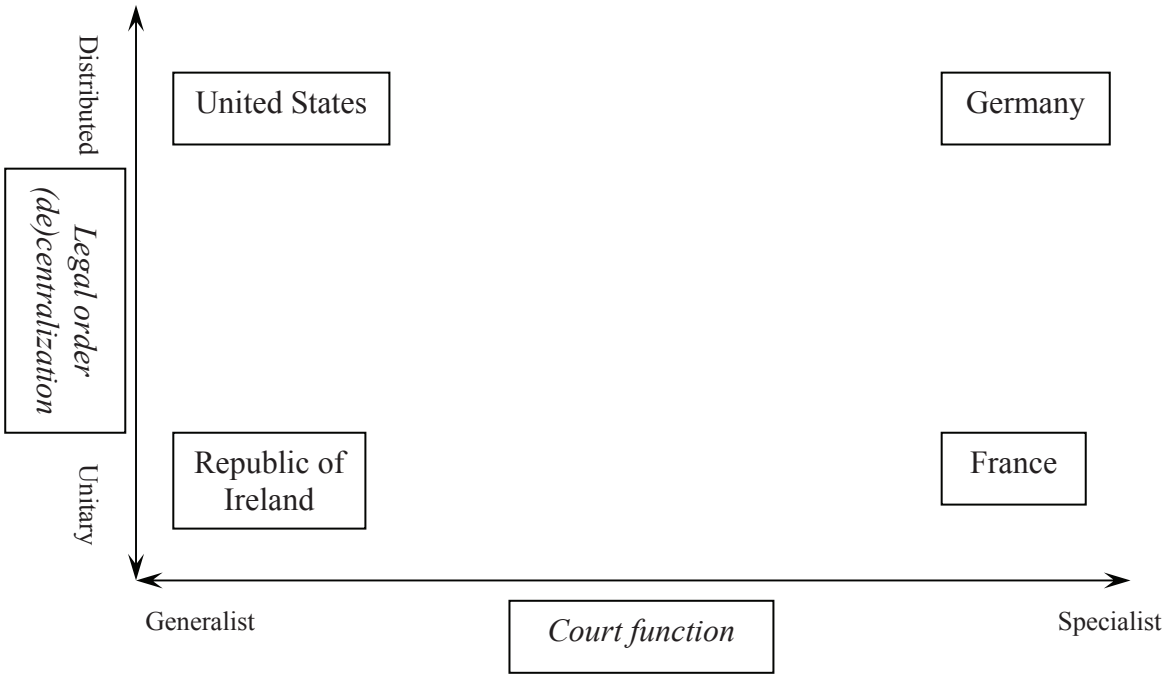


Table 2: Comparative approaches and **formal** United Kingdom position

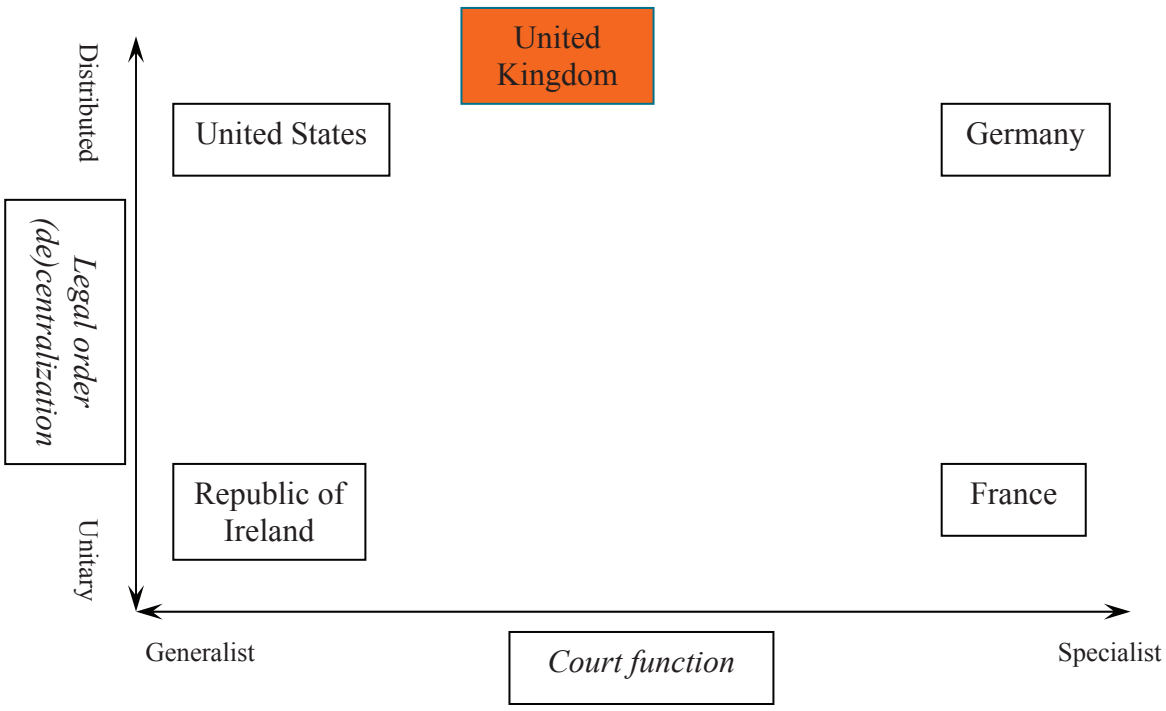


Table 3: Comparative approaches and **substantive** United Kingdom position

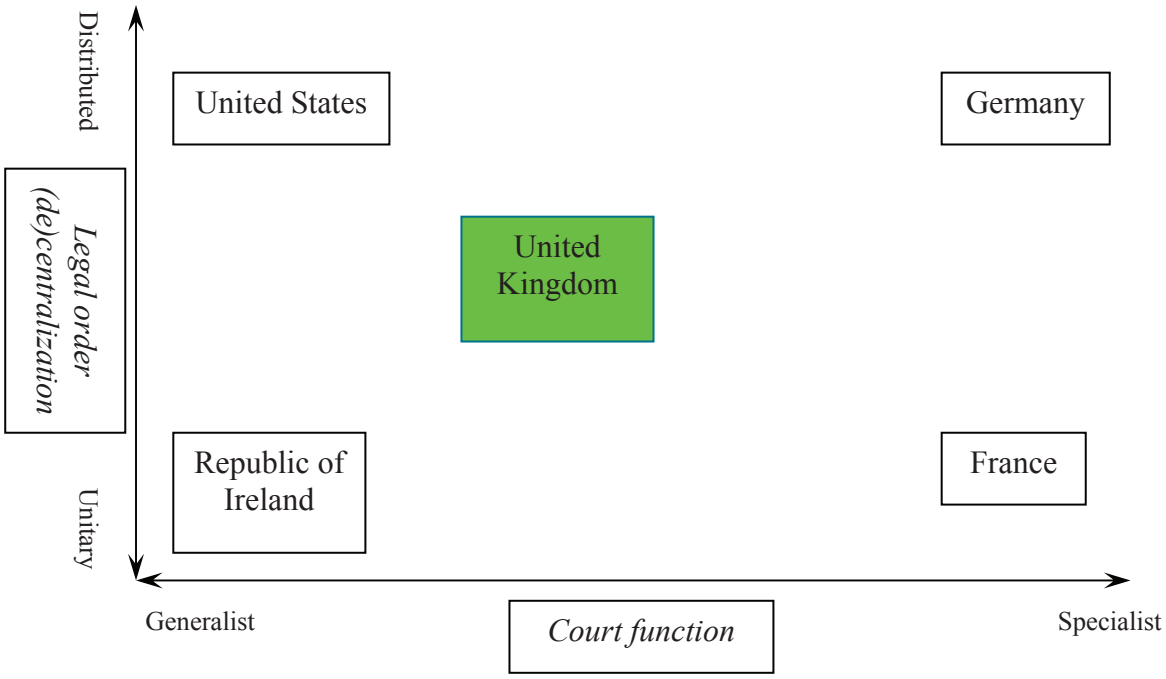
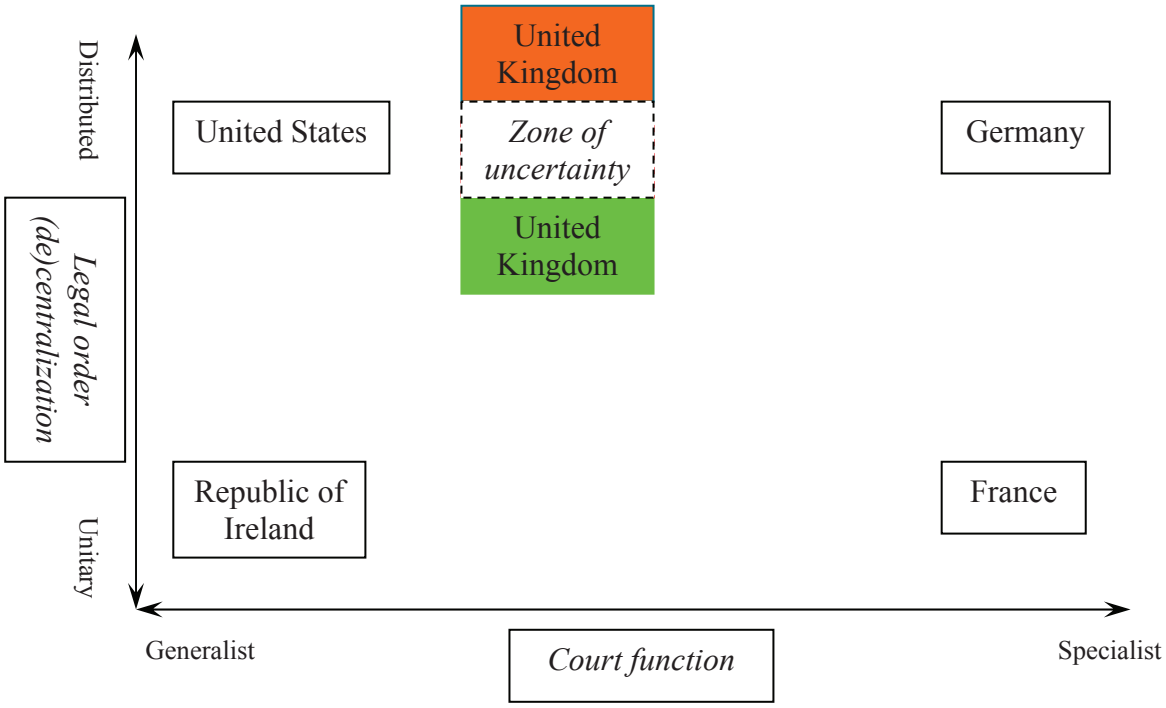


Table 4: Comparative approaches and **formal** and **substantive** United Kingdom position



An evaluation of the Scottish and UK judicial appellate structures in terms of the horizontal axis highlights some striking features. The United Kingdom Supreme Court follows the traditional common law model outlined above; that is to say, it is highly generalist in form—an apex court for appeals from across the United Kingdom's legal systems. A significant exception to this universal jurisdiction is that Scottish criminal appeals cannot be taken to the United Kingdom Supreme Court; though arguably, the devolution issue jurisdiction of the United Kingdom Supreme Court gives that court a limited and indirect criminal jurisdiction in Scottish cases. In this way the regional integrity of Scottish criminal law is recognised, and with that recognition of regional integrity there is also reinforcement at the appellate summit of the single basic functional distinction which runs through Scots law and the Scottish courts system between civil and criminal law.

Another important example of the way in which regionalisation (on the vertical axis) introduces specialization (on the horizontal axis) is the convention that at any one time two of the twelve Justices will be trained Scottish lawyers. Of course, this *is* only a convention, with the new statutory formula for the Supreme Court merely requiring that there be at least one member of the court who is familiar with Scottish law—a rather weaker formula in terms of regional protection.[29]

For all their generalist form, other dimensions of specialization are evident in the recent development of the jurisdiction of our apex court. The judicial functions of the House of Lords developed over the latter part of the twentieth century in such a way that the predominant business of the court became matters involving questions of public law.[30] There appears no compelling reason that the business of the new United Kingdom Supreme Court will be any different.

This trend towards public law specialisation raises a broader question—to what extent is the United Kingdom Supreme Court able to assume the character of a constitutional court? The importance of the question is underlined by the relatively recent enactments of statutes of a quasi-constitutional nature, such as the Human Rights Act 1998 and the Scotland Act 1998, which put some of the building blocks of a constitutional jurisdiction in place.[31] Of course, the scope of this constitutional jurisdiction remains of a different order than that available in a state that boasts a written Constitution. The much more encompassing provisions of the Constitution of the United States, for example, allows its United States Supreme Court to exercise a much broader and more robust constitutional jurisdiction. Yet although the United Kingdom Supreme Court's constitutional jurisdiction is much narrower, it seems clear at least that there is today much more widespread judicial recognition of the existence of a distinctive type of constitutional case requiring a distinctive style of constitutional

[29] Constitutional Reform Act 2005 s 27 (8) states 'In making selections for the appointment of judges of the Court the commission must ensure that between them the judges will have knowledge of, and experience of practice in, the law of each part of the United Kingdom.' In Canada there is also specific provision that at least three members of the Supreme Court are drawn from the bench and/or bar of Quebec: Supreme Court Act s 6.

[30] See A Le Seur *A Report on Six Seminars About the UK Supreme Court* (Queen Mary University of London, School of Law Legal Studies Research Paper No 1 of 2008) 17. For example, of the 59 cases disposed of in 2005 the vast majority concerned matters with a strong public law dimension: 14 human rights cases; 7 employment law cases; 6 family law; 5 international law; 5 revenue; 3 practice and procedure, and 3 administrative law decisions.

[31] See e.g. B Hadfield 'Constitutional Law' in A Le Seuer and L Blom-Cooper (eds) *The Judicial House of Lords 1876-2009* (OUP Oxford 2009) 501.

reasoning. It remains to be seen whether and how this new approach will be fleshed out further over the early years of the Supreme Court.[32] Again, however, the very fact that those charged with the task of developing the new constitutional jurisprudence are now for the first time exercising a 'supreme' jurisdiction may over time reinforce the assertiveness with which this is pursued.[33]

4.4 Conclusion

Consideration of the vertical and horizontal axes from a comparative perspective highlights quite different but equally important points about final appellate jurisdiction in Scots law. Moreover, what is remarkable in each case is the limited extent to which the Scottish case conforms to the comparative norm, such as it may be. With regard to the vertical axis, we have noted the zone of uncertainty between the hard formal jurisdictional autonomy of Scots law and the substantive trend towards overlap and convergence—a complexity which is avoided in a typical federal distribution of authority. With regard to the horizontal axis, we have noted the typical common law resistance to specialization in the top courts, but again somewhat modified by local features; by the absence of a Scottish criminal appellate jurisdiction in the Supreme Court and by the shift towards a strong public law (and incipient constitutional) jurisdiction.

In some respects, however, these distinguishing features, and the problems they raise, are also related. Such horizontal specialization as exists in our final appellate jurisdiction is tied up with territorial differences within the Union state. What is more, when we consider the zone of uncertainty over the formal and substantive autonomy of Scots law before the Supreme Court, we should recognize that the significance of this is amplified by the fact that the Supreme Court remains the most generalist of apex courts, competent to pronounce on all matters of Scots law except those that arise directly in criminal proceedings.

[32] B Hadfield 'Constitutional Law' in A Le Suer and L Blom-Cooper (eds) *The Judicial House of Lords 1876-2009* (OUP Oxford 2009); A Tomkins 'National Security, Counter Terrorism and the Intensity of Review: a Changed Landscape (2010) LQR (forthcoming).
[33] See further Chapter 3.5.1.1.

Chapter Five:
The Evaluation of Final Appellate Jurisdiction

5.1 Criteria of Evaluation

What values should the organisation of final appellate jurisdiction serve? Below we consider eight such candidate values, and provide a preliminary assessment of the current organisation of final appellate jurisdiction in Scotland in terms of these values. The values and associated standards with which we are concerned are *democracy*, *fair treatment*, *coherence and integrity*, *richness of resources*, *expertise*, *detachment*, *operational effectiveness* and *economy*.

Two preliminary points should be made about these values. The first concerns *compatibility*. The different values address quite disparate matters, and often there may be a tension between measures required to support one value and those required to support another value, or, indeed, even between measures required to support some aspects of a certain value and those required to support other aspects of that same value.

The second preliminary point concerns *relevance*. The organisation of final appellate jurisdiction, concerned as it is with the most prominent aspect of one of the central pillars of our constitution, is an issue that enjoys a considerable public profile. However, this should not divert us from the fact that it is also an issue whose immediate focus is quite narrow, and, therefore, one whose pertinence to broader political and legal system concerns cannot simply be assumed but requires careful analysis.

If we classify our various values with the issue of relevance to the fore, this point is highlighted. We may usefully distinguish between those broader political values to which the nature of the legal order, including the organisation of final appellate jurisdiction, is only one of many contributory factors, and those values with which the legal order is directly concerned. On the one hand, democracy and fair treatment are broader political values, and the manner in which the legal and court system connects to these broader values is quite indirect, though still important. On the other hand, coherence and integrity, richness of resources, expertise, detachment, operational effectiveness and economy speak to values and standards that are intrinsic to the legal order. Here, too, however, as we shall see, the specific contribution of the organisation of final appellate jurisdiction to the capacity of the legal order as a whole to meet the value in question requires close consideration, and may on reflection turn out to be modest or remote.

5.2 Democracy

Democracy is concerned with the basic idea of collective self-government—government by and for 'the people'. As such, it is commonly viewed as *the* framing value of modern politics and political systems.[1] For all that the value of democracy is widely affirmed in principle, however, its application is complex and controversial. In particular, two key sets of issues arise about the practice of democracy, both of which are significant when we come to assess the organisation of final appellate jurisdiction. The first issue concerns *how* 'the people' should govern themselves, given that plebiscitary government or any other form of highly participatory self-government is simply not feasible as a general model of decision-making in large polities. The second issue, to which we return at the end of this section, concerns just *who* 'the people' are who should govern themselves.

The answer to the first question—the 'how' question—inevitably involves institutions and mechanisms of representative government.[2] In modern democracies such as our own, to the extent that the people 'rule' they do so mainly through their elected representatives and the overall machinery of government placed under the general direction of their elected representatives. When assessing the adequacy of the institutional framework of representative democracy we have to guard against opposite dangers.

On the one hand, representative democracy requires that the institutions of government do not become too remote from external direction and accountability. Rather, they must remain reasonably responsive to the concerns of the citizenry at large. Responsiveness may be achieved through a number of methods. First, it may be sought prospectively through the guidance of general legislation—a key institutional expression of the democratic will. Secondly, it may be sought retrospectively through various accountability mechanisms; these range from the ballot box for elected representatives to detailed systems of regulation, reporting and sanction for the various sectors of government administration and other public institutions. Thirdly, and more broadly, we should also consider an adequately responsive framework of representative democracy as a cultural achievement—one that is negotiated over time between governmental institutions and the citizenry. This is because the effective operation of prospective and retrospective controls and checks depends upon their being sustained by a set of attitudes within public institutions that accepts the demands and disciplines of a representative system of government as well as by a sense of identification with these institutions on the part of the general public as properly representative of the public interest. In other words, what is required is a culture of institutional compliance on the one side and a culture of public respect for and confidence in these institutions on the other side, with each set of dispositions reinforcing the other.

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[1] See generally J Dunn *Democracy: a history* (Atlantic Monthly Press London 2006); J Dunn *Setting the People Free: the Story of Democracy* (Atlantic Books London 2005); J Keane *The Life and Death of Democracy* (WW Norton & Co 2009).

[2] For a classic treatment see: JS Mill *Representative Government* (Kessinger Montana 2004) (JW Parker & Son London 1859).

On the other hand, representative democracy must also guard against overreach. In particular, its mechanisms should not intrude too far into those areas of government and administration where specialization or a disinterested approach is at a premium. Democracy without respect for these limits can lead to forms of decision-making deficient in relevant knowledge or expertise, lacking objectivity and promoting sectional interests, favouring majorities unduly over minorities, or engaging popular passions at the expense of the articulation of generally and publicly defensible reasons.[3] *The methods of representative government, therefore, must be applied as much to shielding government from inappropriate forms of influence as to opening government up to appropriate forms of influence*. Again, legislation is important, as it can specify the terms and protect the jurisdictional boundaries of a particular public institutional office. Other and complementary shielding methods include systems of training, selection, appointment, tenure and accountability which emphasize the appropriate qualifications and forms of autonomy of public officials.

What does consideration of these various aspects of democracy's 'how' question suggest as regards the organisation of final appellate jurisdiction? How do we ensure that the overall appellate framework is sufficiently but not unduly responsive to the demands of representative democracy? At first glance, the main danger with regard to the judicial office, and one that applies more sharply than with the majority of other public institutions, would appear to lie on the side of too much public influence rather than too little. Why is this so?

As already noted, a key building-block of representative democracy is the instrument and overall system of general legislation. In turn, the democratic responsiveness of legislation (and, indeed, of other sources of law whose continued existence involves the implicit endorsement of the democratic legislature) depends not just on how the law is made, but also upon its practical application, and so upon how the judges exercise their specialist function of legal interpretation in disputed cases. It is elementary, therefore, that judicial fidelity to the value of democracy is best served where judges view their primary responsibility as lying to the (democratically generated and endorsed) letter of the law, and to its disinterested interpretation and application, rather than to any extraneous influence. This indeed, is an important background reason why, in the organisation of the judiciary, so much store is set by certain other values to which we shall return below; by the ideal of judicial independence from political interference in matters of selection, decision-making and tenure and by the related ideal of impartiality with regard to the parties and issues before the judge in the instant case (see further 5.7 below); and by the value of judicial competence and expertise (see further 5.6 below). In a nutshell, therefore, the democratic responsiveness of the law as an institution demands that the judges, as the key personnel of that institution, are themselves first and foremost responsive *not* to 'the people' or their representatives directly, but to the law itself.

Yet something can be said on the other side of the equation too. There are certain limited respects in which the value of representative democracy does require the institution of the judiciary to reflect more closely the democratic basis of the polity, and this has implications for the organisation of the scheme of final appellate jurisdiction. In the first place, and most fundamentally, the role of the judge is never to interpret and apply the law *in general*, but always to interpret and apply the law of

[3] See e.g. P Pettit 'Depoliticizing democracy' (2004) 17 *Ratio Juris* 52.

the *particular* legal system (or systems) that corresponds to the democratic unit (or units) which provides the basis for the judge's own authority. Accordingly, the structure of final appellate jurisdiction should reflect and respect that link, ensuring the allegiance and attention of the judges to the appropriate legal system (or systems).

In the second place, the basic legislative choice of design of the scheme of final appellate jurisdiction—regional or central, specialist or generalist, ordinary or constitutional—through which the link between democratic unit, legal system and judicial oversight is forged, should itself reflect the aspirations of the democratic constituency it is intended to serve. To the extent that the relevant democratic constituency in the case of the organisation of the judiciary is the Scottish people, therefore, the choice of institutional design should fall to their representatives.

In the third place, to the extent that the application of the law inevitably raises hard cases where fidelity to a legal text is not enough and judges are bound to exercise a discretion, there is a case for a bench, including a final appellate bench, which is more broadly representative of the population it serves than has been the case with the traditionally socially homogenous ranks of the judiciary. Judges sometimes have to make difficult choices at the margins of inherently contested moral and political issues, and there is a well rehearsed argument for these decisions to rest with a group drawn from a more diverse range of backgrounds, experiences and perspectives on life.[4] This is an issue which goes to the class, gender and ethnic background of judges, but also, and most pertinently in the present case, to their national background, and the question of the level of Scottish representation in the Supreme Court or any alternative court of final appeal. Importantly, the argument here is as much about the culture of democracy—about public confidence in the representativeness of the judiciary—as it is about any supposedly objective relationship between social background and patterns of decision-making.[5]

Fourthly and finally—and still with the cultural dimension of democracy—confident identification on the part of the citizenry with a public institution as 'their' institution may depend not only upon institutional design and representativeness, but also upon other more informal indices of familiarity or belonging. One important such standard is institutional location and visibility. Crudely, a public institution at a physically remote location from a particular political community is less likely to be the subject of identification by members of that political community than one that is situated within

[4] See S Styles 'The Scottish Judiciary' in A McHarg and T Mullen (eds) *Public Law in Scotland* (Avizandum Publishing Edinburgh 2006) p 183 *et seq*; EW Smith *Continuous Improvement: An Analysis of Scotland's Judicial Appointments Process* (Report for the Judicial Appointments Board for Scotland October 2009): http://www.judicialappointmentsscotland.org.uk/judicial/files/Continuous%20Improvement%20An%20Analysis%20of%20Scotland's%20Judicial%20Appointments%20Process%20-%20Volume%201%20-%20October%202009%20[final].pdf; K Goodall 'Ideas of Representation in UK Court Structures' in A Le Seur (ed) *Building the UK's New Supreme Court* (OUP 2004); K Malleson 'Diversity in the Judiciary: The Case for Positive Action' (2009) 36 Journal of Law and Society 376; N Garuopa and T Ginsburg 'Guarding the Guardians: Judicial Councils and Judicial Independence' (2009) 57 Am J of Comp Law 103.

[5] Which in the case of judicial decision-making has been a notoriously difficult relationship to demonstrate: Mrs Justice Dobbs 'Diversity in the Judiciary' (Queen Mary University of London Lecture 17th October 2007): http://www.judiciary.gov.uk/docs/speeches/diversity_judiciary_171007.pdf.

the community. Again this is directly relevant to the case of final appellate jurisdiction in Scots law, and to the question of where the top court should be located.

To conclude our argument we must now return to the second puzzle of application of the democratic principle, namely the question of *who* is the relevant democratic constituency or *demos*. As noted at length in Chapter Two, the situation of Scotland in this regard is complex and not finally settled. For democratic purposes, the Union state must be regarded as a multi-level polity. The state of the United Kingdom has a longstanding democratic pedigree, and so there is a strong democratic argument for its law, and the appellate court system which supports that law (and which is itself a product of recent UK legislation) to be viewed as something held and expressed in common. But Scotland, as a historical nation that has since the Scotland Act 1998 again boasted its own legislature and executive, albeit within the framework of the British state, has democratic claims of its own. What is more, in terms of the provisional line between the democratic sphere of the British people and that of the Scottish people negotiated under the Scotland Act, the legal system in general and the indigenous court system in particular clearly falls within the local democratic sphere. Accordingly, there is a strong case that the separate Scottish democratic identity should also be reflected in the shape of the appellate court system that supports its distinct legal order.

This means that, in each of the four dimensions considered above, the argument that the appellate system should reflect the democratic basis of the polity pulls us simultaneously towards both key democratic sites in the Union state. Most basically, the existence of overlapping UK and Scottish democratic constituencies means that the democratic principle cannot favour either an exclusively UK-based or an exclusively Scottish-based foundation, allegiance and focus for the political and legal order as a whole, as it applies to Scotland, and for the appellate scheme which serves that legal order. Equally, the democratic principle does not favour either an exclusively UK-authored or exclusively Scottish-authored solution in the basic legislative choice of institutional design of the appellate system. Furthermore, the democratic argument also sends out a mixed message as regards both the question of the (nationally) representative character of senior judicial office-bearers and the location of the final appeal court. Rather, in respect of all of these questions, consideration of democratic values points to an arrangement which should be sensitive to the mixed and multi-tiered character of democratic pedigree and identity across Scotland and the United Kingdom.

This, however, it should be stressed, is an assessment attuned to and limited to present constitutional circumstances. In the future the broader political and constitutional landscape may change, and the democratic argument may pull much more strongly—perhaps decisively—in one direction.[6]

[6] See Chapter 6.2.1.

5.3 Fair Treatment

Law makes both universal and particular claims about its proper scope of authority. It makes universal claims where it is argued that certain matters are so fundamental to the quality of human life, or to the just organisation of human affairs, that a basic imperative of fair treatment requires them to be legally addressed and resolved in the same manner and to the same effect for everyone, regardless of their jurisdictional location. Law makes particular claims where it is argued that the correct answer to all or some ethical or political issues can only be found locally (this tends, at root, to be either a democratic argument or some variant of the integrity argument—see 5.4 below).

Engaging as they do contentious questions of morality, universal arguments are notoriously difficult to make in a manner that is broadly persuasive.[7] We only have to consider the very limited appeal of so-called 'natural law' arguments in the contemporary world to appreciate this. Nevertheless, there are certain areas in which universal fair treatment arguments, or at least arguments that cut across and appeal beyond particular national constituencies, have greater currency than others.

A key example is supplied by human rights. Since human rights engage matters that go to the core of human equality, freedom and dignity, and since their broad scope is corroborated by the large number of transnational instruments concerned with rights, including (most pertinently to us) the Council of Europe's European Convention on Human Rights (ECHR), a claim to universality will carry more weight in this area than in others. Other areas where considerations of fairness argue in favour of general application—if not universally at least across a range of societies sharing certain cultural similarities—would include economic freedoms (regulated under the European Union and the World Trade Organisation) and labour protection (regulated under the auspices of the International Labour Organisation).

In these and other examples, therefore, a persuasive case may be made in favour of equal treatment across all or wide-ranging populations. When this kind of argument from fairness is applied to the relationship between the UK and its parts, it suggests that the wider rather than the more narrow conception of common jurisdiction should prevail, and that the system of common appellate jurisdiction should reflect this. In all cases where there is a background of transnational law, moreover, the moral case for equal treatment is provided some reinforcement by considerations of legal obligation, since the United Kingdom as a state is required to ensure that the relevant transnational legal standards[8] are applied throughout its territory and across its various internal jurisdictions.[9] This mix of moral and legal considerations, indeed, is one part

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[7] See for example: M-B Dembour *Who Believes in Human Rights?: Reflections on the European Convention* (CUP 2006).

[8] In the normal case, under our dualist constitutional framework any breach of international law will have no direct impact upon domestic law unless the relevant rule of international law is formally incorporated into domestic law: see Chapter 4.2 n 15. In the case of the European Union there are special arrangements governing the domestic effect of certain EU legislative instruments without the need for formal incorporation on a case by case basis; there are also special arrangements which relate to instruments of the Council of Europe, most obviously those associated with the European Convention on Human Rights.

[9] The terms of the Scotland Act 1998 s 29 (2) (d) reflect this requirement—clearly the decision to limit the competence of the Scottish Parliament to matters which are compatible with European Community

of the argument for a strong central jurisdiction in the form of the Privy Council, and now the new Supreme Court, as the final court of appeal for "devolution issues", since consideration of such issues includes—and in fact, as we have seen,[10] has so far been dominated by—questions of the ECHR-rights compatibility of legislative and executive action on the part of Scottish, Northern Irish and Welsh devolved institutions. More generally, as has been demonstrated by recent example,[11] final appeals in Scottish civil cases may also raise human rights issues, and here the same consideration applies.

Yet any presumption in favour of a uniform law serviced by a uniform appellate system across jurisdictions within the United Kingdom and beyond on the basis of considerations of fair treatment remains subject either to rebuttal or to modification on the basis of more particularistic arguments. For example, in the case of the ECHR itself, now applied to the various jurisdictions of the UK under the Human Rights Act 1998, a well-established feature of the jurisprudence both of its own Strasbourg court and its various national interlocutors[12] is the "margin of appreciation" doctrine; according to that doctrine, national institutions may within certain limits interpret the meaning of various Council of Europe Convention rights differently in recognition of differing local circumstances and cultural backgrounds. And while the moral and legal argument in favour of a more jurisdiction-specific interpretation applies first and foremost *between* states, there is a strong case to the effect that it also applies across the separate jurisdictions or otherwise relatively autonomous parts of the same state.[13]

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and ECHR law was taken with the intention to maintain a common UK approach, see also Schedule 5 Paragraph 7 in combination with section 29 (2) (b), which treats international relations more generally as a reserved matter; but see n 13 below.

[10] See Chapter 3.4 and Appendix II.

[11] *Somerville v Scottish Ministers* 2008 SC (HL) 45.

[12] Although UK domestic courts tend not to use the language of "margin of appreciation," as that doctrine is said to be the province of the Strasbourg Court; rather, courts located within the UK tend to emphasise the concept of 'due deference': see TRS Allan 'Human rights and judicial review: a critique of "due deference"' [2006] 65 CLJ 671.

[13] For the ECHR, see e.g. *Belgian Linguistic Case,* App. No. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64 (July 23,1968), concerning the permissibility of different linguistic educational requirements for different territorial communities in Belgium. For the EU, a recent decision of the Grand Chamber shows that if a Member State's internal constitutional arrangements provide that different devolved administrations shall have legislative competence for different parts of the state, as with the UK, it shall not constitute impermissible discrimination for these different parts to have different minimum requirements for the purposes of qualifying for direct payments under the common agricultural policy: *Horvath v Secretary of State for the Environment, Food and Rural Affairs (C-428/07)* [2009] 30 EG 66 (CS). Again, this suggests a broader message about the scope for variation within a state of nominally universal or common standards.

5.4 Coherence and Integrity

The very notion of a legal order implies the existence and importance of an idea of law as an integrated whole. The quality of law is not simply a matter of the merit of isolated legal rules, or the aggregate value of a bundle of rules. It is also a matter of the relationship between legal rules within a broader corpus or system. This systemic quality is sometimes referred to under the label of coherence, and at other times under the label of integrity. These labels are on occasion used interchangeably. More often, however, the idea of integrity is used to denote a stronger and more emphatic systemic quality than that of coherence.

More specifically, when we refer to the good of coherence or integrity we tend to be referring to one of three different kinds or clusters of qualities.

In the first place, and at the more modest end of the spectrum, a system where the rules are coherent with one another, or at least are subject to a standard of mutual coherence as a regulative ideal or aspiration, is a system that will exhibit a number of benefits associated with the very idea of the Rule of Law. The acknowledgement of a requirement that rules should be coherent with one another—that they should make sense as a whole—ought to generate a system that is more transparently comprehensible, more accountable, more predictable, more consistent between analogous cases and more open and responsive to good arguments that appeal to the system's relatively clear and encompassing framework of internal rationality. Such a system ought, in other words, to make it easier for the individual citizen both to orient his or her conduct to the law and to maintain a constructively critical relationship to that law.[14]

In the second place, and at the more ambitious end of the spectrum, where reference is made to the integrity of a legal order, the focus tends to be substance rather than form. The emphasis is on the way in which the various rules and principles of the legal order have become mutually adjusted and refined over time so as to take cumulative account of a vast and increasing range of problem situations, with the result that individual decisions are more likely to involve serious reflection upon, learning from and refinement of the existing corpus.

We have to be careful in isolating precisely what the virtue of this is. The point cannot be an essentialist one, involving the claim that the model of integrity exhibited by one legal order is necessarily better than that exhibited by another. The aim should not be to glorify a particular national legal past for its own sake, or to argue that there is any intrinsic value in retaining any particular branch of our global legal heritage in a pure state—or indeed returning it to a pure state—*just because* it is acknowledged as an important part of our global legal heritage. A certain type of legal nationalism or traditionalism—of which there is evidence in Scotland just as there is in all jurisdictions[15]—is tempted in one or both of these directions. But that would be to

[14] See for example Lon Fuller's famous discussion of the "inner morality of law": LL Fuller *The Morality of Law* (Revd edition Yale University Press New Haven 1969) 39.

[15] In particular Scottish legal nationalism especially since the 1950s has been closely associated with a return to the civilian tradition: for rich discussion, see e.g. L Farmer 'Under the Shadow of Parliament House: The Strange Case of Legal Nationalism' in L Farmer and S Veitch (eds) *The State of Scots Law: Law and Government After the Devolution Settlement* (Butterworths Edinburgh 2001); C Kidd

miss the key merit of the integrity argument, which is a knowledge-based one. It involves an appreciation that only to the extent that a legal system self-consciously evolves *as a* system, rather than as a mere aggregation of rule and cases without any robust requirement of internal coherence across time and subject-matter, will it then be in a position to exploit effectively its historical and systemic reservoir of experience and practical reason.[16] The key, then, is not to claim that one version of integrity is intrinsically superior to another, but merely that the development of a particular legal order should remain sensitive to its own evolved version of integrity.

In the third place, there is also a sociological variant of the systemic argument. The integrity of a legal order is not just a matter of internal rationality but may also reflect the integrity of its social environment. Again, we should discount essentialist versions of this argument. It is not the case that a societal environment is ever so distinctive or unchanging in character, or that any legal order is ever such a deep and unchanging expression of that societal environment, that we should celebrate any particular version of that legal order as somehow uniquely attuned to that societal environment. Scots law has no perfect (and no permanently settled) 'fit' with its environment, any more than English law has with its. Nevertheless, a legal system may be *more or less* well adapted to a particular complex of environmental feature and pressures.

Coherence and integrity, clearly, are by no means unqualified or self-evident goods. To begin with, the benefits associated with them are difficult to produce, sustain or measure. The idea of law as a system required to justify itself in internally coherent terms, or as a system capable of learning from its own experience, are each attractive in principle. However, as the controversy attending those theories of law which have celebrated these features testifies, it is difficult to specify with any precision or agreement either the necessary and sufficient preconditions of such goods or their overall beneficial impact. Secondly, there is an element of internal tension within these goods. While some ambitiously talk about a legal system possessing overall or 'global' coherence or integrity, others confine themselves to the more modest idea of the coherence or integrity of certain 'local' parts or specialist sectors of the system as a whole.[17] Clearly, global legal-order integrity and local legal-sectoral integrity can point in opposite directions. Thirdly, the value of system integrity—both internal and societal—has an undeniably conservative dimension. The past becomes an important factor in informing or constraining the present and the future, and this may be in tension with other values relevant to a legal order, such as those associated with law as an instrument of decisive (and discontinuous) democratic change, or those concerning the benefits of exposure to the resources of another legal system (see 5.5 below).

Union and Unionisms (CUP Cambridge 2008) Chapter 5; KGC Reid 'The Idea of Mixed Legal Systems' (2003-2004) 78 Tul L Rev 5; A Rodger 'Thinking about Scots Law' (1996-97) 1 Edin LR 1; Lord Rodger of Earlsferry '"Say Not the Struggle Naught Availeth": the Costs and Benefits of Mixed Legal Systems' (2003-04) 78 Tul L Rev 419.

[16] For a philosophical grounding in this area see Dworkin's theory of law and integrity: R Dworkin *Laws Empire* (Harvard University Press Cambridge Mass. 1986); TRS Allan *Constitutional Justice: A Liberal Theory of the Rule of Law* (CUP Cambridge 2001). Also, more generally, see the approach of the so called 'common law constitutionalists': T Poole 'Questioning Common Law Constitutionalism' (2005) 25 Legal Studies 142.

[17] For different conceptions of legal coherence see BB Levenbook 'On Universal Relevance in Legal Reasoning' (1984) 3 Law & Philosophy 1; N MacCormick 'Coherence in Legal Justification' in A Peczenik (ed) *Theory of Legal Science* (D Reidel Publishing Dordrecht 1984); J Raz *Ethics in the Public Domain* (OUP 1994) 277 *et seq*.

If we accept that the existence of a top court, itself professionally concerned with the coherence and integrity of a legal order, is an important way of furthering the coherence and integrity of that legal order, what do these various dimensions of coherence and integrity imply for the organisation of appellate jurisdiction in Scotland? The message is again a mixed one, particularly once we take account of the various qualifications to the values of coherence and integrity.

To the extent that Scots law has continued to evolve as a distinctive system in substantive terms, which as we have seen is much more so in some areas such as property, family, and criminal law, than in others, then there are arguments from internal rationality and embedded practical knowledge in favour of continuing to recognise and support this.[18] At the same time, there are some areas of Scots law, such as the law of negligence, aspects of contract law and large parts of public law, that have developed in quite close coherence with laws of other parts of the UK, and here the proper unit to benefit from the values of coherence and integrity within the relevant local sectors may be the UK rather than Scotland.[19] What is more, and reinforcing the UK dimension, on account of the legislative monopoly of Westminster in matters of Scots law for 290 years and the development of strong elements of a common social and political culture, similarities in the external environment are as likely to apply at the UK as at the Scottish level. For example, many of the arguments in favour of the need to retain a core of 'internal market' law, commonly applied across the UK in matters such as employment law, company law and intellectual property law, concern the way in which a UK-wide national economy had developed over the centuries; the continued prosperity of the integrated national economy, it is contended, depends in some measure upon a level legal playing field for all actors within that UK-wide market place.[20]

5.5 Richness of resources

The importance of coherence notwithstanding, any legal order may benefit from being exposed to and tested against the widest range of relevant legal arguments and supporting materials. It follows that the development of the law of any jurisdiction will be enhanced if it is open to consideration of the legal solutions and techniques available in other jurisdictions. Quite how valuable such exposure is may be contentious and may vary with circumstances, as will the appropriate basis for reception of any non-domestic influences that may be inconsistent with home-grown doctrine. But few would doubt that legal openness to how things are done elsewhere is in principle valuable.

What does this imply for the organisation of final appellate jurisdiction in Scotland? On the one hand, it may be thought particularly valuable from a resource-sharing perspective that the final appeal in questions of Scots civil law takes place in a forum

[18] An example from private law, which in some respects at least exhibits a greater degree of system specificity and internal coherence, would be the difficulties of the integration of the floating charge within Scottish property law: see GL Gretton 'Reception without Integration? Floating Charges and Mixed Systems' (2003-2004) 78 Tul L Rev 307.
[19] A clear example here would be in the commercial sphere, more specifically the UK wide provisions relating to intellectual property law; this evolved policy emphasis is reflected in Schedule 5 paragraph C4 of the Scotland Act 1998 which provides that intellectual property is a reserved matter.
[20] HL MacQueen 'Scotland and a Supreme Court for the UK?' 2003 SLT 279, 280.

which typically contains a majority of judges from the adjacent legal order of English law. This is so because, as the original source of the common law and of the family of common law legal systems, English law possesses undeniably rich doctrinal resources. Today its legal culture remains a vibrant one, its bar and broader professional environment generating a range and interest of litigation and producing a flow of judicial decision and reasoning that remains unmatched in the majority of modern jurisdictions. On its own, for reasons of sheer size Scots law cannot hope to produce anything like that quantity and quality of case-law, and so should in theory be very well placed to draw from the unusual riches of such a closely aligned jurisdiction.

However, two caveats have to be entered. First, there is the problem of undue influence. There is a fine line between external enrichment of a legal order and disregard of its integrity, and there is no shortage of claims that this line has been from time to time overstepped, and continues to be so, in the context of English law's influence over Scots law.[21] Secondly, and to pursue the argument from the opposite perspective, to the extent that external enrichment remains a good thing it is not clear that the merger of final appellate jurisdiction within a single court is the only or even the most effective way of achieving this. An analysis of Scottish cases in the House of Lords over the last 15 years shows that English judges in the House of Lords have frequently been reticent about bringing their own rich legal tradition to bear in pronouncing on matters of Scots law,[22] even if this reluctance may in some measure be offset by evidence of the willingness of Scottish judges to be informed by English sources in deciding Scottish cases.[23] What is more, receptiveness to the external influence of English law might be achieved—and achieved in a more controlled way—by other means. If we draw from the experience of the supreme courts of other jurisdictions small and large—especially over the last 50 years, with the gradual (re)turn to a more cosmopolitan approach to the question of foreign sources[24]—there is no reason in principle why a separately constituted Scottish top court could not be as open to the riches of other laws, and in particular English law, as the House of Lords has been or the new Supreme Court may be when constituted as a Scottish court.[25] Cross-fertilization may be more natural, indeed inevitable *within* a merged final appellate court, but a similarly receptive attitude can also be cultivated *between* courts.[26]

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[21] Well known recent instances include: *Sharp v Thomson* 1997 SC (HL) 66; *Burnett's Trustees v Grainger* 2004 SC (HL) 19; *Moncrieff v Jamieson* 2008 SC (HL) 1.

[22] See the figures supplied by J Chalmers 'Scottish Appeals and the Proposed Supreme Court' (2004) 5 Edin LR 4. Interestingly, more recent figures suggest that since 2003 non-Scottish judges have become less reticent about giving opinions in Scottish cases—so, for example, while between 1993 and 2004 non-Scottish judges gave an opinion in around 17% of cases, a similar calculation for the period between 2003 and 2009 suggests that non-Scottish judges gave an opinion in 55% of cases: see Appendix IV.

[23] See for example, the speeches of Lords Rodger and Hope in *Davidson v Scottish Ministers* 2006 SC (HL) 1, bringing the Scots law on the availability of coercive remedies against the Crown into line with English law. Of course, there are examples of cross-fertilisation in the opposite direction—the most famous of which is *Donoghue v Stevenson* 1932 SC (HL) 31.

[24] See e.g. S Choudhry (ed) *The Migration of Constitutional Ideas* (CUP Cambridge 2006).

[25] See J Chalmers 'Scottish Appeals and the Proposed Supreme Court' (2004) 5 Edin LR 4; A Le Seur *A Report on Six Seminars About the UK Supreme Court* (Queen Mary University of London, School of Law Legal Studies Research Paper No 1 of 2008) 42-43.

[26] Or, indeed, between separate chambers of the same Court; see Chapter 6.5

5.6 Expertise

Clearly, those who are charged with making final legal decisions on the law of a particular jurisdiction should be sufficiently expert in the law of that jurisdiction. One argument that has often been made against the House of Lords—and may now be made against the Supreme Court—as the final appellate court for Scotland is precisely that its English-trained judges lack the necessary expertise in Scots law to make an authoritative contribution to its development. Indeed, often this argument shades into the argument from undue influence set out above. To the extent that there have been examples of the inappropriate use of English authority by English judges in Scottish cases, this may be due to a mutually reinforcing combination of a belief in the superior resources of English law and a lack of knowledge of or interest in Scots law. Alternatively, lack of expertise may lead to reluctance on the part of English judges to contribute in Scottish appeals, and this may lie at the root of their patchy record of contribution. This, too, has its cost, as it means that the final appeal in Scottish cases may be decided wholly or primarily by Scottish judges—which normally means just the two permanent members, and so effectively by a smaller bench than would have been present in the Court of Session at the previous stage of proceedings.[27]

The expertise argument, however, should not be overstated, and in fact can point in both directions. In an ideal world, all judges would be uniformly expert across all areas of their jurisdiction, but this is never the case. In this regard, unevenness of expertise in Scots law may simply be viewed as a special case of a broader pattern of uneven expertise. More often, such unevenness applies to subject areas rather than entire jurisdictions, with some judges more expert in particular branches of the law (e.g. public law, commercial law) than in others. From that perspective, indeed, the fact that the House of Lords, and now the Supreme Court, draws its cases (and, potentially at least, its members)[28] from all branches of the law may be seen to be an advantage for the development of Scots law, with the balance of judges capable of contributing a broader range of subject-area expertise than would be available from a bench drawn entirely from Scottish legal practice.

[27] This would normally be a bench of three, but we should bear in mind the considerable scope to have a larger bench: See Chapter 3.5. 2.

[28] The appointments process for the Supreme Court allows for the appointment of a Justice from any part of the United Kingdom. As England provides by far the largest jurisdiction, the breadth of the pool of expertise from which the Supreme Court can draw its members, therefore, depends significantly on the size and diversity of the English bar and its work. On the appointment process and the role of specialisation, see Chapter 4.3 n 26. An important additional source of expertise, of course, lies in the opportunity for Supreme Court judges to learn versatility 'on the job'. Judicial expertise, therefore, is contributed as much by those from a generalist background as by specialists, which accounts for the historical emphasis upon the benefits of having 'generalist' Scottish judges in the House of Lords. See S Styles 'The Scottish Judiciary' in A McHarg and T Mullen (eds) *Public Law in Scotland* (Avizandum Publishing Edinburgh 2006).

5.7 Detachment

Detachment refers to the capacity of judges to perform their role *sine ira et studio*—free of commitments or interests that might compromise their fair and neutral application of the law. In the 18th and 19th centuries, the argument was often heard that a London-based Court was less likely than an Edinburgh-based Court to be implicated in the kind of local affairs, occupied by the kind of local concerns or subjected to the kind of local pressures that might compromise its ability to reach decisions in a dispassionate and disinterested manner.[29]

However telling in an earlier age, such an argument is no longer persuasive. Insofar as there are benefits to be gained from being detached from the national jurisdiction today, these are in fact arguments of a different sort. They are concerned not with honesty, good faith and capacity to resist external influence, but with knowledge and perspective; not with detachment and objectivity but with the critical distance and enhanced insight that can be achieved through exposure to the riches of another jurisdiction in a court that is common to both jurisdictions. Accordingly, these considerations properly belong to the family of resource-based arguments considered above (5.5).

This is not to suggest that contemporary judges are never susceptible to bias associated with their broader beliefs and interests, or indeed to external pressures and expectations. To the extent that they are, however, this is a matter appropriately dealt with by rules and practices on selection, appointment, tenure and recusal intended to ensure judicial independence and impartiality;[30] and, indeed, this is an area of the law where there has been significant development in all UK jurisdictions, including Scotland,[31] in recent years. It would be a severe indictment of the failure of these rules, and of the broader culture of judicial autonomy and objectivity they seek to reinforce, if the question of the territorial location of the final appeal court continued to be treated as relevant to the judge's capacity to act with professional integrity.

5.8 Operational Effectiveness

Courts are not simply the point of authoritative decision within a legal system, but also a large part of the means by which the law is rendered effective as a living system. They are a vital instrument in ensuring the delivery of the most basic standards of justice promised by the law. The organisation of final appellate jurisdiction has a bearing upon various aspects of operational effectiveness.

A first such aspect has to do with responsiveness. How effective is the top court in meeting demand? In particular, how accessible is it to parties, taking account of the time, cost, number of stages of proceedings and formal rules of access? A second

[29] See Appendix I.
[30] See article 6 of the ECHR which specifically mentions both judicial independence and impartiality as aspects of the right to a fair trial: '…everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.' For general discussion of the Scottish positions, see S Styles 'The Scottish Judiciary' in A McHarg and T Mullen (eds) *Public Law in Scotland* (Avizandum Publishing Edinburgh 2006).
[31] Judiciary and Courts (Scotland) Act 2008.

aspect concerns self-monitoring and self-correction. How effective is the appeal system, including the organisation of final appellate jurisdiction, in identifying and correcting erroneous decisions? A third aspect refers to development and refinement of the law. How good is the system at identifying cases that are important for the overall direction of the law and at concentrating resources on these cases? A fourth and final aspect concerns authoritative settlement. Does the organisation of final jurisdiction allow disputed matters of law to be resolved authoritatively with reasonable despatch? [32]

Arguably, the system of appellate jurisdiction in the House of Lords, and now its Supreme Court successor, is in principle reasonably accessible, bearing in mind the absence of discretion on the part of the court to refuse leave to appeal; although this has to be balanced against the cost and delay of such a process, and, as we have seen, the overall figures on the frequency of resort to Scotland's final appeal court suggest very modest levels of usage.[33] Further, by providing a second level of oversight in civil matters (just as the Judicial Committee of the Privy Council has indirectly provided a second level of appeal in criminal matters for the past decade of its 'devolution issues' jurisdiction), the London appeal supplies an important self-correcting mechanism. On the other hand, the absence of leave criteria in Scottish appeals to the House of Lords makes it more difficult to guarantee that the most important cases are heard, or that the correct priorities are identified in the development and refinement of the law. The combination of the party-led final appeal avenue in civil law and the complicated variety of procedural routes to the reference of devolution issues means that the appeal chain can also be both cumbersome and unpredictable, causing the law to be more unsettled than it might otherwise be.

What this suggests is that a final appellate court remote from the domestic jurisdiction possesses certain qualified benefits associated with responsiveness and self-monitoring, but also certain drawbacks associated with the developmental potential of the law and its settled quality. Yet we should be careful not to draw categorical conclusions from this. Questions of operational effectiveness depend upon the fine detail of institutional rules and arrangements, and are only indirectly affected by the crude balance of authority between Edinburgh and London.

5.9 Economy

Considerations of cost and value for money must play some part in the assessment of the optimal organisation of final appellate jurisdiction. When announcing their plans for a new UK Supreme Court in 2004, the UK government estimated the foundation cost at £56.9 million. The final cost of situating the new court in the refurbished Middlesex Guildhall was in fact £59 million, with a further £18 million required to relocate the criminal courts which had previously occupied that building, together with annual running costs estimated at £13.5 million. This serves as a cautionary tale for anyone advocating a new dedicated Supreme Court for Scotland, although the set-up costs for such an institution would of course be much less if this involved using the premises and personnel of the existing College of Justice. The picture is further

[32] See J Chalmers 'Scottish Appeals and the Proposed Supreme Court' (2004) 5 Edin LR 4; HL MacQueen 'Scotland and a Supreme Court for the UK?' 2003 SLT 279.
[33] See Chapter 3.5.1.1, and n 62.

complicated when one takes into account the ongoing costs of the operation of any new system, and whether there are any compensatory savings due to the relief of pressure from other parts of the court system.[34] As with questions of organisational effectiveness, the provision of an economical system is a matter of fine legal and administrative detail that goes beyond the basic balance of provision between Edinburgh and London.

5.10 Conclusion

In the introduction to the present chapter it was suggested that when considering the values relevant to the design of appellate jurisdiction we would face problems of compatibility and relevance. Both types of difficulty were duly encountered in our subsequent discussion. As regards compatibility, there is a measure of tension between democracy and a number of the other values, principally fair treatment, expertise and detachment. There is also some antagonism between certain aspects of coherence and integrity on the one hand and richness of resources on the other, as also between expertise and richness of resources. Furthermore, we often find tension between different aspects of the same value, most notably in the case of coherence and integrity, expertise and operational effectiveness.

As regards relevance, in certain instances the relationship between the value under consideration and the question of appellate jurisdiction turns out to be extremely remote, as in the case of detachment, economy and—at least in some of its aspects—operational effectiveness. And even where the relevance of the scheme of appellate jurisdiction to the furtherance of the value is somewhat clearer in principle, as with the values of democracy, fair treatment, wealth of resources, coherence and integrity and expertise, the relationship between institutional design and value remains complex. There is simply no single model of appellate jurisdiction that provides an optimal institutional expression of any of these values considered separately, still less all in combination.

Consideration of the relevant values, in short, cannot provide us with a perfect formula for designing a scheme of final appellate jurisdiction. More modestly, however, such consideration does serve to demonstrate some unavoidable trade-offs between values and to indicate which of the candidate values are least engaged by our analysis. It also allows us to isolate a more select cluster of values which, even if they cannot be fully reconciled, should all figure in some measure in whatever institutional solution is reached.

[34] A relevant consideration here is the Gill Report, published in September 2009: Lord Gill *Report of the Scottish Civil Courts Review* (Scottish Civil Courts Review 2009). If and when implemented, through a mixture of new rules raising the minimal value of actions before the higher courts and restricting rights of appeal to these courts, the scheme laid out will considerably reduce the level of business passing through the Court of Session, and to that extent free up appellate resources.

Chapter Six:
Final Appellate Jurisdiction: the Alternative Models

6.1 Six Models for Scotland

This chapter sets out the available options for the future development of final appellate jurisdiction in Scotland and assesses these in terms of their desirability and practicability. It concentrates on six different models for reform, some of which allow for internal variation and sub-division.

In evaluating and comparing the various alternatives, we stop short of advocating 'one best way' of proceeding. This is for three reasons. First, any such advocacy is inevitably dependent upon the weight we place on the different values set out in the previous chapter, and upon how much or how little we judge these values to be served, both individually and in the balance, by different institutional models. Each of these questions, as we have seen, is complex and controversial. They cannot be answered independently of certain background moral and political preferences and without a measure of speculation about the probable consequences of this or that institutional choice. In the final analysis, therefore, they cannot be answered to general agreement or satisfaction outside of the political process itself. Secondly, the feasibility of the different models depends in some measure on background political circumstances and the shifting balance of power between Edinburgh and London, factors that are beyond our control or even our confident prediction. Thirdly, there may, in any case, be options beyond or between the six models we contemplate. Indeed, the very idea of a model, while useful as a device for thinking coherently and economically about alternatives, suggests a level of integrated design that the political dynamics of reform may well not permit or favour. Instead, other mixed or hybrid options may be available and may emerge, and we should also be aware of and open to these.

To stop short of advocating one best way, however, is not to imply that all models, and all options within and across models, should be given equal credit. As our analysis demonstrates, some models are clearly preferable to others, at least in certain circumstances and in some cases in all conceivable circumstances. We begin by looking at these models which are more likely to require a significant alteration of the background political circumstances, and then we move to examine a series of models which seem more closely in tune with the present circumstances of the Union state.

The six main models are as follows.

Model One has an autonomous Scottish appellate court system.

Model Two has Scottish appellate arrangements fully integrated into a UK-wide appellate court system.

Model Three has the present arrangement, with the Supreme Court the top court for civil appeals and for devolution issues and the High Court of Justiciary the top court for criminal appeals.

Model Four has a Scottish Division or Chamber of the Supreme Court.

Model Five has a quasi-federal Supreme Court.

Model Six has a United Kingdom Court of Justice.

6.2 Model One: An Autonomous Scottish Appellate Court System

There are two main variations on this theme. Either there is a comprehensively autonomous institutional framework, embracing final appellate and constitutional jurisdiction in a new Scottish Supreme Court (or Courts), or there is a fully repatriated system of final appeal in ordinary civil and criminal matters, but with constitutional matters ("devolution issues" in particular) continuing to be reserved to the UK centre and so to the new UK Supreme Court.

6.2.1 Full Autonomy

The first and comprehensively autonomous variant can hardly be contemplated in circumstances other than the emergence of Scotland as a sovereign state. As noted in Chapter Four,[1] there is simply no precedent in constitutional law for final and *substantive*[2] jurisdictional autonomy over all matters of law—ordinary and constitutional, regional and federal—arising within a territorial jurisdiction below the level of the sovereign state to be allocated to a court located within and under the authority of that sub-state jurisdiction. Inevitably, the allocation of final constitutional jurisdiction to a judicial authority representing the constitutional part rather than the constitutional whole, including jurisdiction over questions of the relationship between the part and the whole (i.e. what are presently framed as "devolution issues"[3]) would threaten the constitutional integrity of the whole. This presents a solution that not only is incoherent, but is also highly improbable. This is so because it is difficult if not impossible to envisage the circumstances under which such a novel form of constitutional and judicial autonomy would ever be agreed to by those legally and politically empowered at the constitutional centre.[4]

If, on the other hand, Scotland were to emerge as an independent and sovereign state, then it would be in full democratic control of the design of its own appellate court system. In such circumstances, it is likely that Scotland would follow the model of most other independent states in creating an autonomous and self-contained internal framework of appeal corresponding to its autonomous legal (and underlying political) order within the territorial confines of the jurisdiction itself. There are many precedents for a fully autonomous and self-contained appellate solution, even amongst comparably small states emerging from a relationship of participation within or dependence upon the United Kingdom and its systems of law and of courts, including Ireland in 1920 and New Zealand in 2003. There are also

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[1] See Chapter 4.2.

[2] This, it should be stressed, is quite different in kind from the comprehensive *formal* jurisdictional autonomy of the present Scottish appellate system. As discussed in Chapter Four, this formal autonomy consists in the fact that the UK Supreme Court treats all Scottish cases as matters of Scots law, and in that strict sense unfailingly acts as a Scottish court in Scottish cases; but this formal perfection of autonomy fails to take into account the following elements of substantive convergence with other domestic legal systems (a) that the Supreme Court remains situated outside Scotland, and has jurisdiction over the laws of other domestic legal systems alongside its Scottish jurisdiction, (b) that the majority of its judges are neither Scottish nor trained in Scots law, and (c) that, even when dealing as a Scottish court with Scottish cases, some of the law it applies is common to Scotland and other parts of the UK and is interpreted on the assumption that its meaning and import should be common across the jurisdictions in which it is in force.

[3] This does not mean that the constitutional jurisdiction would have to be retained in its present form, centred on the "devolution issues" jurisdiction as currently established under the Scotland Act. For further discussion, see Chapter 6.7.

[4] A similar and hardly less strong objection on both normative and practical grounds could be made against the claim to jurisdiction of a fully autonomous Scottish appeal system over the common or 'federal' stream of law within the UK. This objection is central to the critique of the conditionally autonomous model considered under Chapter 6.2.2.

some precedents in the other direction, both in the common law world and beyond. The Constitutional Court of Bosnia and Herzegovina, for example, requires external members,[5] as does the Hong Kong Court of Appeal.[6] More radically, final appellate jurisdiction may be territorially 'outsourced' in some small jurisdictions, as in the case of the 30 jurisdictions which still permit final appeal, in at least some categories of cases, to the Judicial Committee of the Privy Council.[7] In all such departures from the fully autonomous and self-contained model, however, there is some special factor present, whether a recent history of internal or regional conflict or a long tradition of acceptance of law common to the member states of the Empire or Commonwealth, which is not applicable in the Scottish case.

If, therefore, as is highly likely, the fully autonomous and self-contained route were to be taken in an independent Scotland, significant institutional choices would remain. An independent Scotland would doubtless have its own written Constitution, and this would provide the basis for a formally distinct category of constitutional law and constitutional jurisprudence. Would the new constitutional jurisdiction be best served by a dedicated Constitutional Court set apart from the final appeal court for ordinary civil and criminal matters, or would the better option be an integrated Supreme Court? As noted in Chapter Four,[8] the normal institutional choice for states with a common law heritage has been a single integrated court, whereas civilian systems have tended to prefer a specialist constitutional court. South Africa, under its 1996 Constitution, is one recent exception to the common law norm, although, like Scotland itself, its pedigree is in fact a complex mix of common law and Roman-Dutch civilian law. Scotland, however, is a much smaller jurisdiction than South Africa. *As in the case of jurisdictions of comparable size such as Ireland and New Zealand, therefore, the more efficient and economical solution for an independent Scotland would appear to be an integrated apex court.*

One possible disadvantage of the integrated solution, however, would be a failure to treat constitutional cases in a sufficiently distinct manner. The question of the distinctiveness of a constitutional jurisdiction has both an objective and symbolic component. Objectively, there is a persuasive argument that the style of constitutional reasoning, concerned as it is with the interpretation of a law that is of fundamental significance, and generally couched in more open-ended and politically contentious terms than 'ordinary' law and legislation, is and should be somewhat different from ordinary legal reasoning.[9] Symbolically, constitutional decisions often have an effect on the body politic—whether for example, by ruling primary legislation to be invalid because contrary to fundamental principles, or by making sensitive choices about the proper allocation of authority between different departments of state—that is both profound and controversial. Therefore, the general acceptability of such decisions may depend upon their being invested with a degree of legitimacy greater than that required for ordinary judicial decisions. Arguably, moreover, the relevance of both of these points may be all the greater for Scotland being a new constitutional polity; one in which, even allowing for the rise in constitutional jurisprudence over the last decade, the judicial experience and

[5] Law on the Court of Bosnia and Herzegovina Art 24 (BiH Official Gazette No 49/09).
[6] Hong Kong Court of Final Appeal Ordinance c 484 ss 5 (3) & 9.
[7] C Thompson-Barrow *Bringing Justice Home: The Road to Final Appellate and Regional Court Establishment* (Commonwealth Secretariat 2008).
[8] Chapter 4.2.
[9] A Stone Sweet 'Constitutional Courts and Parliamentary Democracy' in M Thatcher and A Stone Sweet (eds) *The Politics of Delegation* (Frank Cass & Co Ltd London 2003); A Stone Sweet *Governing with Judges: Constitutional Politics in Europe* (OUP Oxford 2000); M Shapiro and A Stone Sweet *On Law, Politics, and Judicialization* (OUP Oxford 2002); K Greenawalt 'Constitutional and Statutory interpretation' in J Coleman and S Shapiro (eds) *Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP Oxford 2002) 268.

popular appreciation of constitutional adjudication is limited, and where some of the more obvious points of contention under the new settlement would likely be put to early judicial test.

These kinds of consideration would seem to call for some degree of institutional recognition of the special character of constitutional jurisprudence. Here again, Ireland offers a possible model to follow for a jurisdiction whose basic choice is that of an integrated apex court. The Irish Supreme Court usually sits with a composition of three or five judges and, exceptionally, seven judges.[10] When hearing cases concerning the constitutional validity of an Act of the Irish Parliament, however, the Constitution requires that the Court consists of a minimum of five judges, in practice the senior members. The same requirement applies when the Court is requested to give an opinion on the constitutional validity of a Bill adopted by the Parliament when referred to it by the President of Ireland,[11] or where it has to determine whether the President has become permanently incapacitated.[12] *What we have, effectively, is a constitutional 'court within a court'—a special procedure within a broader final appellate court where due recognition can be paid to the distinctive style and resonance of constitutional adjudication. There would be clear advantages in drawing a similar internal procedural division within the structure of any future Scottish Supreme Court.*

Turning to broader questions of institutional design, we also have to address the detailed relationship of an indigenous final appellate system with the existing higher judicial institution in Scotland; namely the College of Justice, whose two constituent courts—the Court of Session on the civil side and the High Court of Justiciary on the criminal side[13]—enjoy a common membership.[14] Various options would be available on a spectrum of greater or lesser independence of the new final appellate jurisdiction from the existing College of Justice. At one extreme, just as the top courts of Ireland and New Zealand as well as those of the larger common law systems favour a clearer institutional separation between the supreme level of appeal and the lower echelons of the judicial hierarchy, so too the new Scottish Supreme Court could stand as a court apart from and above the courts of the existing College of Justice. At the other extreme, final appellate jurisdiction could sit within and so be effectively merged with the existing framework of the College of Justice, perhaps with more systematic use of larger panels of judges than is presently the case.[15] And as an intermediate option, a further Inner Chamber of the Inner House of the Court of Session, and possibly a further appellate tier within the High Court of Justiciary, could be created.

The immediate difficulty posed by the last two options—the intermediate option, and even more so, the merger option, is that the very sense of a new, indigenous Supreme Court as a separate apex court would be lost or compromised. And with that loss, certain important advantages would be conceded. The institutional framework necessary for a constitutional 'court within a court' would be absent. More generally, the advantage of a self-standing Supreme Court in terms of operational effectiveness would be sacrificed—its provision of a clear point of highest authority and its establishment of a locus for selecting those cases

[10] http://www.supremecourt.ie/SupremeCourt/sclibrary3.nsf/pagecurrent/36C4492DCD6C52E780257315005A419C?opendocument&l=en.
[11] Constitution of Ireland Art 26. 2. 1°.
[12] Constitution of Ireland Art 12. 3. 1°.
[13] Also known as the Supreme Courts of Scotland, although to some extent this terminology has fallen out of use.
[14] They are referred to as Senators of the College of Justice in the context of the Court of Session and Lords Commissioners of Justiciary in the context of the High Court
[15] See Chapter 3.5.

where review was most necessary and where the development of the law was considered to be of highest priority. Against this, admittedly, an entirely new institutional structure would likely be the more expensive option, though the costs could be mitigated by a more general freeing up of the time of the higher Scottish judiciary along the lines suggested in the recent report of the Civil Courts Review.[16]

There is no reason to believe that a fully autonomous and self-contained appellate system, preferably under the umbrella of a single and institutionally separate Supreme Court, could not serve well the legal needs of a popularly endorsed independent Scottish state, just as similar arrangements have served the needs of myriad other sovereign constitutional democracies. Such arrangements would clearly meet the values of democracy, expertise and operational effectiveness, as well as some aspects of coherence and integrity, and they need not be unduly expensive. Issues of transnational fairness could be addressed by the newly sovereign Scottish legal system and structure of appellate courts retaining or adapting existing links to key European and international courts. Prominent amongst these links would be the preliminary reference to the European Union's European Court of Justice[17] at Luxembourg and the appeal to the Council of Europe's European Court of Human Rights at Strasbourg.[18]

More challenging questions would arise with regard to that aspect of coherence and integrity arising out of historical links with the United Kingdom, and, in a related manner, with regard to the loss of a close institutional linkage with the rich resources of the English legal system. In neither case, however, are the difficulties insurmountable. Like any legal system whose sovereign underpinnings alter, the internal coherence of Scots law would, gradually over time, adjust accordingly, and presumably the intimacy of some of its connections and commonalities with English law would fade. And to the extent that Scots law would still want to look to the experience and example of English law in some areas in order to inform its own development, it could do so, as do many independent states in the Commonwealth and beyond, from the outside. Indeed, as noted in Chapter Five,[19] there has been a significant movement in recent years amongst a wide range of national and transnational judicial elites—prompted in part by the new ease of access to global legal materials as well as by broader trends in the globalization of travel and culture and the renewed post-Second World War interest in universal standards—to look elsewhere for legal inspiration and precedent. There is no reason why a Scots law and the Scottish judiciary, no longer substantively and institutionally intertwined with their English counterparts, and newly armed with the confidence drawn from full control over the terms of reception of external legal influences, should be an exception to that trend.

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[16] Lord Gill *Report of the Scottish Civil Courts Review* (Scottish Civil Courts Review 2009) iv-v.

[17] Of the 434 UK references, under EC Treaty Art 267 (and its predecessors) to the European Court of Justice up to 2007, only around seven have been from Scotland; though there are signs of a more relaxed approach since *Booker Aquaculture v Secretary of State for Scotland* 2000 SC 9: see A Poole 'ECJ in the fast lane' *The Journal Online* http://www.journalonline.co.uk/Magazine/53-12/1006002.aspx.

[18] See Lord Reed and J Murdoch *A Guide to Human Rights Law in Scotland* (2nd edn Tottel Publishing Haywards Heath 2008) chapter 1. An independent Scotland would probably also retain, as part of its basic constitutional settlement, a domestic framework of rights based on the European Convention akin to that contained in the Human Rights Act 1998, so facilitating human rights based actions before its own courts. See *Your Scotland, Your Voice: A National Conversation* Scottish Government White Paper, 29th November 2009 [7.25].

[19] See Chapter 5.5.

6.2.2 Autonomy of ordinary appellate jurisdiction

The second and apparently more modest variation on the theme of autonomy would contain all ordinary appellate jurisdiction in Scotland—whether in a truncated version of the Scottish Supreme Court or, more conservatively, in some variation of the existing jurisdiction of the College of Justice—but, in acknowledgement of the UK's continuing sovereignty, would retain a central UK final court for constitutional matters. This is the only model (other than the mere affirmation of present arrangements under Model Three) of these we are considering that could arguably be developed by the Scottish government and Parliament without the consent of Westminster, since in strict legislative terms it requires nothing more than the removal of the final appellate jurisdiction in civil matters from the new Supreme Court.[20]

However, this model of comprehensive autonomy of ordinary appellate jurisdiction under existing constitutional conditions is more unsatisfactory in principle and provides a more unlikely political mix than the model of full autonomy under the condition of Scottish independence. In particular, in this design, the democratic case, the case from coherence and integrity, and the case from expertise for repatriating final appellate jurisdiction would be much weaker. The UK state, and so a UK democratic identity and competent central legislative source would remain in place, sustaining and renewing a quasi-federal law for all the UK. Yet, depending upon the jurisdiction within which the case happened to be heard, the final interpretation of that quasi-federal law would now fall to be decided by different courts with different mixes of expertise and with no effective requirement to reconcile their decisions or reasoning. To pursue the federal analogy, just as it would be unprecedented in the annals of comparative constitutional law to allow final constitutional interpretive authority for the whole to the courts of the part,[21] so, it would be equally unprecedented to allow final authority over the interpretation of the 'federal' law to the courts of the part. In short, if Scottish courts in the British state were to be allowed final authority over all Scottish-sourced actions apart from the narrowly conceived constitutional law of "devolution issues", the appellate structure would stand out of kilter with the underlying legal and political reality to a considerable extent. This would lead to an unprincipled splitting of the authority and fragmentation of the practice of legal interpretation in matters of final appeal.

6.3 Model Two: A Unitary Appellate System for a Unitary State

Again there are two variations on this theme. A first and more extreme variant would see a unitary court system as the complement to a unitary law. A second and more modest variant would instate a unified final appellate structure for the whole of the UK without removing the separate identities of the various national laws.

6.3.1 Unitary Final Appellate System for a Unitary Legal Order

The first option would remove the pattern of institutional difference between the various legal and court systems of the United Kingdom at source by eradicating the very idea of distinct orders of Scots, English and Northern Irish law. That is to say, Scots law would simply lose its identity as such, ceasing to have either the substantive shape and content or the formal status of a separate law. *Such comprehensive disregard for deep-rooted patterns of historical and contemporary variation has no place in the Union state and is neither defensible in*

[20] See Chapter 2.4.
[21] See Chapter 6.2.1.

principle nor feasible in practice. It is, however, worth posing as the limiting case of the application of a unitary logic, and as indicative of where the most egregiously Anglocentric attitudes to law may have led to in the past or where they might lead if they were given full rein in the future.[22] On this view, the destiny of Scots law is to be incorporated by English law, or at best reduced to its satellite or subaltern. English law is treated as the imperial line towards which all other laws converge. If this vision were to be realized, the legislative devolution of the past decade would have to be reversed, and the substantial and much more venerable legacy of distinct Scots common law and statute law would become a wasting asset. At the level of the appellate system, this option would require a common final appellate jurisdiction for Scots and English criminal law to go with the common civil and "devolution issues" jurisdiction. More significantly, the purpose of the new fully unified jurisdiction would be to fashion and apply a single or harmonized law.

Even if such an approach could garner political support, it would have few merits and many disadvantages. Incorporation or a strong programme of harmonization might in principle bring some benefits in terms of access to a rich pool of common resources and some aspects of societal integrity, but this would be far outweighed by the negative consequences of the effective destruction of a separate legal system. This would eliminate the key means for giving voice to Scotland's claim for popular identity within a multi-level democracy, as well as destroying the internal integrity and the accumulated expertise of a well-developed legal culture.

6.3.2 Unitary Final Appellate System for Different Legal Orders

The second and more modest variant would remove the indigenous element in the Scottish final appellate structure, namely the finality of appeal to the High Court of Justiciary in criminal cases, but would not otherwise challenge the idea of Scots law as a distinct legal order. Such a proposal would remove one apparent anomaly, but in so doing would highlight another. The apparent anomaly removed would be the quite different treatment of civil and criminal final appeals from Scotland. The anomaly highlighted would be the absence of a court of final appeal guaranteed to treat with appropriate distinctiveness those areas of Scots law—civil *and* criminal—that diverge substantially from English law.

So each of these first two models—the autonomous and the unitary solutions—must from opposite ends of the spectrum negotiate a high threshold of political feasibility, even if the autonomous model offers more likely prospects than the unitary model. And in pursuing their respective underlying commitments the two models seem, again from opposite positions, to take a one-sided view of UK democracy and legal culture. They ignore, or dismiss as irrelevant to their broader political vision, the extent to which the UK, as a Union state, involves the co-existence of different jurisdictions reflecting different levels of political community. And so these models do not pursue what such co-existence entails, namely a relationship between legal systems that is at one and the same time formally one of mutually exclusivity and substantively a mix of divergent and convergent strands.[23] Neither, in turn, do these models interest themselves in what the retention of such a complex intersection of legal

[22] See discussion in Chapter 5.5 and 5.6. Perhaps the most notorious example of such a danger is a speech of Lord Cranwarth LC: 'But if such be the law of England on what ground can it be argued not to be the law of Scotland? The law as established in England is founded on principles of universal application not on any peculiarities of English jurisprudence and unless therefore there has been a settled course of decision in Scotland to the contrary I think it would be most inexpedient to sanction a different rule to the north of the Tweed from that which prevails to the south.' *Bartonshill Coal Co v Reid* (1858) Macq 266 (HL) 285.
[23] See Chapter 4.2.

orders, occupying the 'zone of uncertainty'[24] between formal autonomy and substantive overlap, implies for the institutional design of a final appellate scheme that is respectful of our key values.

Do the other four models fare any better in addressing the intricacies of the overlapping legal arrangements of our Union state as presently constituted?

6.4 Model Three: The UK Supreme Court as the New Status Quo

The new system retains the existing arrangement of a split jurisdiction between London and Edinburgh, now with a single UK-wide apex court for both civil appellate and constitutional matters, but still not criminal appellate matters. The main asset of this arrangement is that, in allowing the two Scottish judges a strong but usually still minority presence and a powerful but by no means exclusive voice in Scottish cases raising distinct questions of Scots law, it is able informally to capture with some success the appropriate mix of divergence and convergence between the separate but inextricable bodies of Scots and English law. That conservative sensitivity to the multi-tiered quality of the Union state and its legal jurisdictions has benefits in terms of a number of our key values: in terms of respect for different democratic spheres; simultaneous recognition of the historical integrity of some areas of Scots law and of certain areas of convergent regulation within (and beyond) UK society; appropriate allocation of expertise; the encouragement of the cross-fertilization of the resources of adjacent legal systems; and the identification of a select group of cases for high-level appellate scrutiny as a tool for the effective refinement of the law.

The very same qualities of conservatism and informality, however, also underscore the limits of these arrangements. Nothing is done to address the anomaly of the different treatment of civil and criminal appellate jurisdiction.[25] Moreover, continuing respect for and commitment to the development of Scots law as a 'relatively autonomous' achievement on democracy, integrity, expertise, resource-sharing and operational effectiveness grounds depends on three factors, none of which can be guaranteed under the present system. It depends, first, on a healthy flow of good cases, apt to lead to the development of Scots law in key areas, coming through the party-led but relatively expensive and protracted appellate channel to London.[26] It depends secondly, on Scottish judges continuing to be represented on the Supreme Court in the quantity and quality sufficient to be granted and to be capable of performing a leading role in Scottish appeals involving questions distinct to Scots law.[27] And it depends, thirdly, on their non-Scottish colleagues, rather than ignoring, overriding or circumventing Scots law—whether civil law in ordinary appeals or the otherwise untouchable criminal law in "devolution issues", making a serious contribution to Scots law *qua* Scots law, both by

[24] See Chapter 4 Table 4.
[25] Or, indeed, any difficulties associated with 'indirect' criminal appeals to London under the "devolution issues" jurisdictions, see Chapter 6.7.
[26] On the quality of cases, see, for example Lord Hope's observations in *Wilson v Jaymarke Estates Ltd* [2007] UKHL 29; 2007 SC (HL) 135 [16]-[20]. On the modest quantity of cases, see Chapter 3.5.1.1 and n 62.
[27] As already noted, (see Chapter 3, n 65) the absence of a guarantee that there will be two Scottish judges, taken together with the effective guarantee of one judge from Northern Ireland under the Constitutional Reform 2005, might effectively weaken the convention in favour of two Scottish members. It is also noteworthy that the prominent role and high standing of the two current Scottish members of the apex court, both judges of considerable seniority, both ex-Lord Presidents and one (Lord Hope) the Deputy President of the Supreme Court, is a circumstance that may not easily be repeated.

seeking to understand it from the doctrinal 'inside' and by contributing advice or persuasive argument from the neighbourly 'outside.'[28]

If there can be no informal guarantee of the right balance in this regard, might there be more formal solutions that fare better? Models four, five and six offer three such possible solutions.

6.5 Model Four: The Supreme Court with a Scottish Division or Chamber[29]

According to this model, the Supreme Court would be reconfigured and 'federalized' such that in all or some Scottish cases it would sit as a dedicated Scottish divisional court with only Scottish judges serving, or at least with a guarantee of a majority of Scottish judges—whether drawn from the permanent membership or a supplementary list.[30] *In addition, and speaking directly to the importance of the democratic sub-theme of identification,*[31] *the visibility of Scottish cases before the Supreme Court could be increased and the symbolic and practical links between the new court and the Scottish legal system could be strengthened by means of all or some of these cases being heard at a location within Scotland—a form of institutional mobility that is already possible under the existing Supreme Court arrangements.*[32] Again, there are two possible versions of this model.

6.5.1 A Scottish Chamber for all Scottish Cases

A first variant has a special Scottish division or chamber in all Scottish cases, regardless of whether the law in question is distinct to Scotland. However, this would be an over-inclusive solution, offering a classic illustration of confusing form with substance.[33] In denying the significance of the common substantive elements of UK law, it would frustrate those arguments from democracy, fair treatment, integrity, wealth of resources and expertise which favour common treatment of these common elements.

6.5.2 A Scottish Chamber for Distinct Questions of Scots Law

A second variant has such a chamber only for distinctly Scottish cases. In principle, this could meet the objections about the one-sidedness of the first variant. In practice, however, it raises difficult questions both about the proper criteria for identifying distinctly Scottish cases, and about how any such institutional division would affect the overall coherence of the UK Supreme Court. These are considered below.

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[28] See Appendix IV

[29] See, for example, Your *Scotland, Your Voice: A National Conversation* Scottish Government White Paper, 29th November 2009 *[*7.19].

[30] See Constitutional Reform Act 2005 sections 38 and 39 on the rules for appointment of supplementary judges.

[31] See Chapter 5.2.

[32] Following undertakings by the UK government it is clear that the UK Supreme Court can sit anywhere within the United Kingdom: see the statement from the Parliamentary Under-Secretary of State for Constitutional Affairs (Mr Christopher Leslie) Hansard HC Vol 416 col 660-2 (13th January 2004).

[33] See Chapter 4.2.

6.6 Model Five: A Quasi-Federal Supreme Court

As we have seen,[34] under a federal system the final appellate courts at the centre are closely involved in the policing of the division between the regional streams of law on the one hand and the federal and constitutional streams of law on the other, and also in providing definitive interpretations of the meaning of federal and constitutional rules and principles. How this is done varies considerably, but in the common law world of integrated final courts, to which the UK model of the Supreme Court belongs, the example set by the United States as the first federal polity of the modern constitutional age remains instructive. Basically, the United States Supreme Court has authority to review by writ of *certioriari* decisions of lower appeal courts where these decisions raise 'important federal questions'; these are questions where the decision at the lower appellate level is on an important point of federal (and, by extension, constitutional) law not previously addressed by the Supreme Court, or is in conflict with a previous decision of the Supreme Court, or reveals a conflict between different lower appeal courts located within different parts of the federal whole.[35]

If we consider the relationship between Scots law and the convergent stream of 'UK' law in informally or quasi-federal terms, a similar set of questions arises and similar answers suggest themselves. The criteria distinguishing purely Scots law cases from common or federal cases would have to be specified and would have to be interpreted by a judicial authority at the centre. *The most likely option would be if these criteria were incorporated under new leave to appeal rules for the quasi-federalized Supreme Court, replacing the open-ended permission presently available in Scottish cases with the requirement for the case to 'raise matters common to more than one jurisdiction of the UK' where the law has not yet been addressed by the Supreme Court itself or remains unsettled between these jurisdictions - or some similar formula.*[36] *Cases not falling within the federal criteria might (as suggested at 6.5.2 above) be dealt with by a Scottish divisional court of the Supreme Court (sitting with only Scottish judges or a guaranteed Scottish majority, and located within Scotland*[37]*). Preferably, however, as a fuller and more satisfactory expression of the jurisdictional autonomy of the part within the 'federal' whole, these distinctly and exclusively Scottish cases would have their final appeal restricted to the indigenous Scottish courts in Edinburgh.*

Such an approach appears promising as a means of securing a more measured distinction and balance between distinctly Scots law and the quasi-federal and constitutional streams of 'UK' law, and so in realizing better those values of democracy, integrity, expertise and resource-sharing which depend upon that balance being well struck. It also has the incidental benefit—linked to the value of operational effectiveness—of allowing a better quality control of Scottish cases reaching the top court, since once the basic principle of leave to appeal in

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[34] See Chapter 4.

[35] See Rule 10 of the Rules of the Supreme Court of the United States, available at: http://www.supremecourtus.gov/ctrules/2007rulesofthecourt.pdf.

[36] For discussion of this and other possible formulae for specifying matters of 'federal' significance, see J. Chalmers "Scottish Appeals and The Proposed Supreme Court" (2004) 8 Edin LR 4, at 29-30. While the candidate rule set out in the text is very general, and so open to the objection of vagueness and of allowing too much discretion to the deciding court over the location of the boundary (see further, text below), other candidate rules seem to suffer from the opposite problem of undue rigidity and superficiality. For example, a rule that restricted appeal to matters of UK statutory interpretation, or to matters outwith the competence of the Scottish Parliament might be more precise, but at the expense of excluding some matters of common principle which lacked a common statutory background and including other matters where a common statutory background was present but not central to the case and question of law at issue (as, for example, in the controversial property law case *Sharp v Thomson* 1997 SC (HL) 66).

[37] See Chapter 6.5.

Scottish cases is conceded there can be no objection to a supplementary requirement, also present in the case of the United States, that only (quasi-federal or constitutional) cases raising a point of law of general importance be heard.[38] Three difficulties nevertheless suggest themselves, although none of them are fundamental.

First, there is the vagueness of the criteria themselves and the difficulty of applying them in an even-handed manner. This reflects the fuzziness of the boundary left by the deep historical interpenetration of Scots and English law. For 'matters common' might cover not just a shared statutory base, but also perhaps identical provisions in separate statutes, and also cases where the non-statutory laws of the two jurisdictions are entangled without quite losing their separate identity—such as in many aspects of the law of negligence or administrative law. What is more, under this model the solution to the puzzle of the optimal division of labour between the two court and appellate systems would require the vesting of a wide interpretive discretion in the judicial representatives of UK-wide system, so reinforcing the sense both of a controversial boundary and of the difficulties of policing that boundary uncontroversially. We should not, however, overstate this objection. As is illustrated by the United States example, it is normal in highly decentralized polities that senior judges act as 'federal umpires,' and it is typical that they do so in accordance with open-ended formulae. The UK case is unusual not in the predicament that arises, but merely in the fact that it has not been addressed until now.

Secondly, the development of a quasi-federal approach would highlight the anomaly of Scots criminal law and its wholesale restriction to a purely Scottish appellate structure. Certainly, under any federal competence rule much Scots criminal law would continue to fall on the distinctly Scottish side of the divide, not least because of the long period of separate development of criminal law guaranteed by the absence of post-Union appeal to London. But this would be true of by no means all contemporary criminal law. Prevention of terrorism or anti-drugs legislation, for example, clearly has a UK statutory pedigree and remains reserved to Westminster under the Scotland Act.[39] In a scheme committed to a more principled division of jurisdiction on quasi-federal lines, it would be very difficult to defend the refusal to criminal law of the same discerning approach taken to civil law.[40] Yet the longstanding investment in the idea of criminal law as an important frontier for defending the autonomy of Scots law might continue to impede such a conclusion.[41] Again, however, this objection should not be overstated. Once a principled basis existed for the restriction to a purely Scottish appellate system of those parts of Scots civil and criminal law alike that are distinctly Scottish, that part of the argument for the wholesale retention of criminal law appeals in Scotland which is fuelled by a desire for compensation or consolation for the opposite treatment of civil law appeals—and so for trading one anomaly for another—would evaporate.

Thirdly, there is the question of how such an initiative would sit with the rest of the Supreme Court jurisdiction. Against a long backdrop of English dominance of the theatre of UK law, it would be difficult to construct a political consensus around the idea of a symmetrical UK-federal solution in which English law is treated in the same way as the other jurisdictions, as having both regional and federal elements. Even if this distinction were accepted in principle, it would be hard to imagine English opinion being prepared to restrict the English right of

[38] See J Chalmers "Scottish Appeals and The Proposed Supreme Court" (2004) 8 Edin LR 4, 29-30.
[39] Scotland Act 1998 Sch 5 B1.
[40] See e.g. CMG Himsworth and A Paterson 'A Supreme Court for the United Kingdom: Views from the Northern Kingdom' (2004) 24 Legal Studies 99.
[41] A Le Seur *A Report on Six Seminars About the UK Supreme Court* (2008) 45-46.

appeal to the successor of their historic final court of appeal on all matters of English law (i.e., the House of Lords) on such a narrow basis.

Would the other alternative of a Scottish-specific or Celtic-wide but still asymmetrical solution be less difficult to contemplate? On the one hand, it would require considerable political will to undertake institutional redesign of the new Supreme Court at such an early stage of its development. On the other hand, there are already elements of asymmetry—and of considerable vintage—in the prohibition of Scottish criminal appeals, in the absence of a leave to appeal requirement in Scottish civil cases and in the pattern of allocation of Scottish Supreme Court judges between Scottish and non-Scottish cases. Asymmetry, then, is nothing new,[42] and would not necessarily be made any more marked or unmanageable by the introduction of a quasi-federal formula for assessing Scottish cases than it is under present arrangements. This point would be strengthened if, as is our preferred option, the cumbersome 'add-on' of a Scottish divisional court of the Supreme Court for purely Scottish cases were to be dropped, (see 6.5.2) and distinctly Scottish cases were instead concluded in Scotland's indigenous courts.

One final advantage of the quasi-federal solution relates directly to the constitutional stream of law rather than to the strictly federal stream. As we have seen, the "devolution issues" jurisdiction has been controversial since its introduction a decade ago.[43] Some of that controversy has to do with the cumbersome procedural framework for appeal or reference to the Privy Council/Supreme Court, and some with the expansive definition of the reviewable acts of the Lord Advocate. But some of the controversy has also been associated with more general sensitivities surrounding *the very principle* of review of the decisions of indigenous Scottish courts on constitutional grounds, especially where—as with the High Court of Justiciary—there was no history of external review on any basis. If we accept as a matter of principle that in a federal or quasi-federal arrangement the integrity of the system as a whole depends upon there being central judicial review of the overall structure and norms of the constitutional settlement and its key principles as well as of the provisions of the federal stream, then this draws some of the sting from the debate. *There will still be disagreement about whether the present "devolution issues" jurisdiction under the Scotland Act supplies the optimal architecture, and since this is a matter entirely within the competence of the Westminster Parliament we will refrain from making a detailed recommendation. However, if we accept a quasi-federal frame, there can be no disagreement that some measure of constitutional review of the terms and limits of the jurisdiction of Scots law is proper, whether and to what extent the emphasis is on the competence provisions of the Scotland Act or on other quasi-constitutional sources such as the Human Rights Act.*

6.7 Model Six: The Supreme Court as a United Kingdom Court of Justice

This model represents a final variation on the theme of a more principled distinction between distinctly Scottish law and a quasi-federal UK law.[44] It requires us to think of the UK as the EU writ small, with a reference jurisdiction, akin to the preliminary reference jurisdiction of the European Court of Justice, by which matters of federal or constitutional concern to the broader territorial jurisdiction may be extracted from a case before the lower court, dealt with at the court of the broader territorial jurisdiction and returned to the lower court for final

[42] See Chapter 2.5.
[43] See Chapter 3.4 and Appendix II.
[44] For a detailed and thoughtful discussion of this option, see A Le Seuer and R Cornes *The Future of the United Kingdom's Highest Courts* (Constitution Unit 2001) Chapter 10.

disposal.[45] This has two potential advantages over the quasi-federal appeal system of a Supreme Court. On reflection, however, these seem more apparent than real, and are in any case offset by other objections.

First, the Court of Justice model is arguably more sensitive to the fact that the boundary between the purely Scottish and the common or quasi-federal strands in UK law is a fuzzy one, and one that knows busy and varied traffic. Recognizing that a federal 'competence catalogue' often begs more questions than it answers, a reference jurisdiction acknowledges that many cases in the laws of the Union state will be genuinely mixed and so amenable to a procedure for separating out the treatment of the regional and federal strands.

Against this, however, it may be argued that while it is one thing for a reference jurisdiction to acknowledge complex mixity and for it not to be bound to accept jurisdiction on an all-or-nothing basis, this does not remove the problem of distinguishing between federal and regional issues. Rather, it merely relocates the problem to a different point in the decision-making procedure. A decision still has to be made as to what constitutes a question of common quasi-federal law, for only such questions may be made a matter of reference and so of authoritative opinion by the reference court. And that decision will be no different in substance and no easier in principle in this procedural context than it would be in the context of a normal appellate structure. What is more, arguably that decision will be more difficult than it typically is in the case of European Union law from which the model is drawn; for at least the general expanse of European Union law rests upon and is demarcated by its Treaty foundations, whereas quasi-federal UK law has both common law and statutory sources.

A second possible advantage of the reference model lies in the balance of authority it strikes between different levels. If, following the European Union example, both the initiative to refer and final disposal of the case were to lie with the referring court, this would answer certain concerns arising under the federal court model with regard to the dangers of allowing final authority over the extent of its jurisdiction (*Kompetenz-Kompetenz*) to an all-powerful highest court. Yet it could equally be objected that to leave the discretion to the lower court would simply be to commit the opposite error, raising the danger of a regional court reluctant to refer contentious issues to the central Court of Justice.[46]

[45] Such a preliminary reference jurisdiction is quite different from the reference jurisdiction associated with "devolution issues" under the Scotland Act. In the latter case, the Judicial Committee of the Privy Council (and now the UK Supreme Court) takes on the entire conduct of the case and determines the proceedings, rather than, as in the former case, merely giving a preliminary ruling, which is then applied by the referring court. See Chapter 3.4.

[46] One partial answer to this, again analogous to the European Court of Justice, would be to create alongside the preliminary reference jurisdiction an additional direct action jurisdiction allowing the British Court of Justice to annul legislation passed by the devolved Parliaments on competence grounds or to take action against the public authorities of the devolved institutions on the basis of their failure to fulfil an obligation imposed on it by an Act of the UK Parliament. Such actions might be initiated either by the British government or the devolved institutions; see A Le Seuer and R Cornes *The Future of the United Kingdom's Highest Courts* (Constitution Unit 2001) Chapter 10.2. Quite apart from its additional complexity and constitutional novelty, such a solution would have the additional drawback of reasserting in a very direct manner the very authority of the central court (and of central government) that the preliminary reference model was designed to avoid.

This is more likely to be the case, moreover, where the reference jurisdiction is asymmetrical, and where there is no multi-centred practice and dynamic of reference (as there is in the ECJ) to 'shame' deviant regional courts into acceptance of a practice of common compliance and dialogue.[47] However, the alternative possibility of the symmetrical development of reference jurisdiction for all the British nations falls foul of an aggravated version of the same 'English objection' as applies to the option of a federal court. From an English perspective the top appellate court has always been first and foremost an appellate court for English law, with limited awareness of and concern for the claims of other jurisdictions. Therefore, any major overhaul—or, in this case, transformation of the basic method—of the appellate structure just in order to satisfy the claims of these other jurisdictions would be in danger of being viewed as the tail wagging the dog.

6.8 Conclusion

None of the models we have examined in this final chapter is free of difficulties, but some offer a more attractive and viable prospect than others in all or at least in some circumstances. Of the two more clearly one-sided models we began with, the unitary model in each of its variants can be discounted on both practical and normative grounds. *The more radical version of the autonomous model—an independent appellate court system for an independent Scots law for an independent state—is perfectly coherent in its own terms and under political and constitutional conditions favourable to an independent solution. Accordingly, we spent some time looking at its institutional design, concluding that a self-standing Supreme Court with separate procedures for ordinary and constitutional jurisdiction would offer the ideal blueprint.* Conversely, the conditionally autonomous model, in which all but constitutional questions would be reserved to Scottish courts in a still sovereign British state, appears both infeasible and quite incoherent in terms of the values we have set out, and for that reason was discounted.

We then turned to those models better suited to the present circumstances of the Union state. The existing model, with its division of final appellate jurisdiction both within the UK Supreme Court and between it and the Scottish courts has its attractions. Ultimately, however, the conservative quality and informality that are its major strengths are also its main weaknesses, as it does not address certain standing anomalies of the system and as it cannot guarantee the long-term stability of its advantages. Of the remaining three options, the idea of a Scottish division or chamber of the Supreme Court is at best a partial answer to a larger question of jurisdictional boundaries, while the reference-based model of a British Court of Justice also avoids rather than answers some of the hardest questions. *The model of a quasi-federal Supreme Court, with those Scottish cases raising common UK issues being heard by the UK Supreme Court (preferably in Scotland)*[48] *and those Scottish cases addressing distinct*

[47] See, for example, KJ Alter *Establishing a Supremacy of European Law: The Making of an International Rule of Law in Europe* (OUP 2001).

[48] Since all cases raising common UK issues would nevertheless remain in formal terms matters of Scots law—matters raised and concluded in the Scottish court system and directly affecting Scottish interests—then the argument from democratic identification, while less persuasive than with regard to Scottish cases raising distinct questions of Scots law, would still seem to favour such 'common UK' cases of Scottish origin being heard at a Scottish location; see Chapters 5.2. and 6.5. However, given their broader federal import, in line with normal federal principles there should be no requirement of a majority or even a weighted minority of Scottish judges in these 'common UK cases', but merely such Scottish involvement as is deemed appropriate in the circumstances of the case in the light of the criteria of national representativeness (Chapter 5.2) and expertise (Chapter 5.6).

questions of Scots law being deal with by the indigenous Scottish courts, fares better. It is most acute in its diagnosis and most sensitive to the relevant values at stake in its treatment of the complex mix of formal autonomy and substantive convergence that lies at the heart of the relationship of Scots law and its appellate court system to that of the UK as a whole, as well as being most likely to overcome the difficulties of reform under asymmetrical conditions. For these reasons we would recommend it as the most attractive reform option under current constitutional conditions.

Appendix I: Historical Development of Appeals from Scotland

A Introduction

The structures of the appellate jurisdictions within the Scottish legal system represent a picture of institutional asymmetry. It is unique for a modern legal system to allow appeals emanating from its civil law[1] appeal court to be decided by the highest court within the sovereign state, while at the same time barring appeals to that same court in criminal matters. However, it is not merely jurisdictional geometry which may surprise the observer of the Scottish legal system. The organic evolution of the United Kingdom's 'constitution' as a whole, and more particularly the development of its pre-eminent court's jurisdiction—until recently the House of Lords, and now the United Kingdom Supreme Court—has meant that the highest court does not have a heritage of constitutional review as distinct from its standard jurisdiction. This characterisation of the appellate jurisdiction, however, is a very general one. A more refined understanding of the appellate jurisdiction of the Supreme Court requires us to trace its, historical development of that jurisdiction within the broader context of the development of the British state.

[1] In this context civil law does not refer to Roman law. Rather, it means anything which is not criminal law. The distinction between civil and criminal law is not necessarily as clear as it may once have been: see below.

B Early Days: the Union of 1707[2]

The methodology of legal history, especially legal history undertaken with the purpose of illuminating modern day positions, remains a problematic subject.[3] Of more immediate relevance, and indeed difficulty, is the related question of where to begin. In the present context, a useful starting point for considering the historical development of the *current* appellate structure in Scotland is the political union with England. On 1st May 1707 the sovereign state of the United Kingdom of Great Britain was born.[4] This new state encompassed the nations of England, Scotland and Wales. The coming together of these two sovereign states into a single entity was consensual,[5] formally at least. And so, it has been observed, in theory it could be similarly unmade.[6]

In the present context the most important aspects of the Union are the provisions within the Union legislation pertaining to the administration of justice in Scotland.[7] The two most important provisions for the present enquiry are articles 18 and 19 of the Treaty of Union, which relate both to substantial law and to the machinery of justice. The relevant texts are reproduced below:-

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[2] See generally: JD Ford 'The Legal Provisions in the Act of Union' 2007 CLJ 106; CA Whatley *The Scots and the Union* (Edinburgh 2006); M Fry *The Union: England, Scotland and the Treaty of 1707* (Edinburgh 2006).
[3] See for example: M Lobban 'Introduction: The Tools and the Tasks of the Legal Historian' and DJ Ibbetson 'What is Legal History a History of' in A Lewis and M Lobban *Law and History* (Current Legal Issues Vol 6 OUP 2003).
[4] Treaty of Union Art 1.
[5] Note however CA Whatley *Bought and Sold for English Gold Explaining the Union of 1707* (2nd edn 2001).
[6] C Himsworth and C O'Neill *Scotland's Constitution: Law and Practice* (2nd edn LexisNexis UK 2003) Chapter 3.
[7] JD Ford 'The Legal Provisions in the Act of Union' 2007 CLJ 106.

Art XVIII: That the Laws concerning Regulation of Trade, Customs, and such Excises, to which Scotland is by virtue of this Treaty to be liable, be the same in Scotland, from and after the Union as in England; and that ***all other Laws, in use within the Kingdom of Scotland do after the Union, and notwithstanding thereof, remain in the same force as before (except such as are contrary to or inconsistent with this Treaty) but alterable by the Parliament of Great Britain***, With this difference betwixt the Laws concerning publick right Policy, and Civil Government, and those which concern private right and the Laws which concern publick right Policy and Civil Government may be made the same throughout the whole United Kingdom; ***but that no alteration be made in Laws which concern private Right, except for the evident utility of the subjects within Scotland***. (emphasis added)

Art XIX: That the ***Court of Session or Colledge of Justice, do after the Union and notwithstanding thereof, remain in all time coming within Scotland as it is now constituted by the Laws of that Kingdom, and with the same Authority and Priviledges as before the Union; subject nevertheless to such Regulations for the better Administration of Justice as shall be made by the Parliament of Great Britain***; And that hereafter none shall be named by Her Majesty or Her Royal Successors to be Ordinary Lords of Session but such who have served in the Colledge of Justice as Advocats or Principal Clerks of Session for the space of five

years, or as Writers to the Signet for the space of ten years With this provision That no Writer to the Signet be capable to be admitted a Lord of the Session unless he undergo a private and publick Tryal on the Civil Law before the Faculty of Advocats and be found by them qualified for the said Office two years before he be named to be a Lord of the Session, yet so as the Qualifications made or to be made for capacitating persons to be named Ordinary Lords of Session may be altered by the Parliament of Great Britain.

And that the Court of Justiciary do also after the Union, and notwithstanding thereof remain in all time coming within Scotland, as it is now constituted by the Laws of that Kingdom, and with the same Authority and Priviledges as before the Union; subject nevertheless to such Regulations as shall be made by the Parliament of Great Britain, and without prejudice of other Rights of Justiciary:

And that all Admiralty Jurisdictions be under the Lord High Admirall or Commissioners for the Admiralty of Great Britain for the time being; And that the Court of Admiralty now Established in Scotland be continued, And that all Reviews, Reductions or Suspensions of the Sentences in Maritime Cases competent to the Jurisdiction of that Court remain the same manner after the Union as now in Scotland, until the Parliament of Great Britain shall make such Regulations and Alterations, as shall be judged expedient for the whole United Kingdom, so as there be alwayes continued in Scotland a Court of Admiralty such as in England, for determination of all Maritime Cases relating to private Rights in Scotland competent to the Jurisdiction of the Admiralty Court; subject nevertheless

to such Regulations and Alterations as shall be thought proper to be made by the Parliament of Great Britain; And that the Heritable Rights of Admiralty and Vice-Admiralties in Scotland be reserved to the respective Proprietors as Rights of Property, subject nevertheless, as to the manner of Exercising such Heritable Rights to such Regulations and Alterations as shall be thought proper to be made by the Parliament of Great Britain;

And that all other Courts now in being within the Kingdom of Scotland do remain, but subject to Alterations by the Parliament of Great Britain; And that all Inferior Courts within the said Limits do remain subordinate, as they are now to the Supream Courts of Justice within the same in all time coming;

And that no Causes in Scotland be cognoscible by the Courts of Chancery, Queens-Bench, Common-Pleas, or any other Court in Westminster-hall; And that the said Courts, or any other of the like nature after the Union, shall have no power to Cognosce, Review or Alter the Acts or Sentences of the Judicatures within Scotland, or stop the Execution of the same;

And that there be a Court of Exchequer in Scotland after the Union, for deciding Questions concerning the Revenues of Customs and Excises there, having the same power and authority in such cases, as the Court of Exchequer has in England And that the said Court of Exchequer in Scotland have power of passing Signatures, Gifts Tutories, and in other things as the Court of Exchequer in Scotland hath; And that the Court of Exchequer that now is in Scotland do remain, until a New Court of

> Exchequer be settled by the Parliament of Great Britain in Scotland after the Union;
>
> And that after the Union the Queens Majesty and Her Royal Successors, ***may*** Continue a Privy Council in Scotland, for preserving of public Peace and Order, until the Parliament of Great Britain shall think fit to alter it or establish any other effectual method for that end. (emphasis added)

Within these two provisions the template for the future of the Scottish appellate structure can be readily discerned. The history of the negotiations of the drafting of the provisions, and indeed the wider context informing those negotiations, has been well described by others.[8] As regards the first provision, that is to say Art XVIII, the obvious issue is the manner in which Scottish law will be incorporated into the new singular Union state. As John Ford notes, the negotiations pertaining to the status of Scottish law were set against a backdrop of dynamic debate on the question.[9] Indeed, the Union of Crowns in 1603 had meant that the topic of political union, and hence the practical facilitation of such a union, had been the subject of substantial contemporary debate for some time. Unsurprisingly, the status of the law of the Kingdom of Scotland, and indeed to a lesser extent England, had been canvassed by pamphleteers and aborted commissions in some depth.[10] As is observed by Ford, in many ways the requirement for a specific saving of Scottish law, unlike its southern

[8] See JD Ford 'The Legal Provisions in the Act of Union' 2007 CLJ 106, 107-118; A Wijffels 'A British ius commune A debate on the union of the laws of Scotland and England during the first years of James VI/I's English Reign' (2002) 6 Ed LR 315; S Tierney 'Scotland and the Union State' in A McHarg and T Mullen (eds) *Public Law in Scotland* (Avizandum Publishing Ltd Edinburgh 2006) 25.
[9] JD Ford 'The Legal Provisions in the Act of Union' 2007 CLJ 106, 107-118.
[10] JD Ford 'The Legal Provisions in the Act of Union' 2007 CLJ 106, 107-118.

counterpart, illustrates the common law orientation of the negotiation and ultimate agreement.[11]

Perhaps the most significant aspect, for present purposes, of the written protection of Scottish law within the Treaty of Union is the distinction that the Treaty draws between 'publick' and 'private' right.[12] The regulation of matters touching 'publick' right and civil government would be made uniform throughout the new state, whereas matters of 'private right' would endure untouched, and only to be altered for the evident utility of the subjects in Scotland. To modern eyes[13] this distinction would appear to have been predicated upon the perceived need for a uniform constitutional law; whereas, with regard to private law, the municipal law of Scotland would retain its distinct character, subject to alteration for the evident utility of the Scottish people. Interestingly, there was contemporary disagreement over the status of criminal law as either 'publick' or 'private, though ultimately no specific provision was made with regard to criminal law.[14] On purely textual grounds, therefore, it is perhaps surprising that private law, with its apparent protection, would become subject to appeals to the House of Lords; while, on the other hand criminal law, with its disputed protected status, would not become the subject of appeal to London.[15] In any event, it is clear that Scottish criminal law was not assimilated with English law, nor was it subsumed within a more nebulous idea of British criminal law.[16] On the flip side, the apparent

[11] JD Ford 'The Legal Provisions in the Act of Union' 2007 CLJ 106, 116-118.
[12] Art XVIII.
[13] JW Cairns 'The origins of the Edinburgh Law School: the Union of 1707 and the Regius Chair' (2007) 11 Ed LR 300, 317-326 gives a good idea of the idea of *ius publicum* at the time.
[14] JD Ford 'The Legal Provisions in the Act of Union' 2007 CLJ 106, 108.
[15] It is also important to remember that the idea of a criminal appeal is comparatively modern one.
[16] A modern illustration of the point may be taken to be Lord Hope of Craighead's statement that the criminal law of the two jurisdictions '…are as distinct from each other as if they were two foreign countries.' *R v Manchester Stipendiary Magistrate, Ex p Granada Television Ltd* [2001] 1 AC 300,

protection afforded to the Scottish law relating to matters of 'private right' has not insulated it from legislative change;[17] yet, the continued existence of a separate Scottish legal system at all is perhaps testament to the efficacy of the Articles of the Treaty.

In addition to the specific provision for the continued existence of the laws of Scotland, the treaty also made provision for the machinery of justice. In the second article reproduced above, Article XIX, we can see that the Treaty also made provision for the preservation of Scottish courts to administer the distinct Scottish law protected in the preceding article. The particulars of the article provide that the Court of Session would remain 'in all time coming', as would the Court of Justiciary, though both would be amenable to statutory reform by the new United Kingdom parliament for the '…better Administration of Justice.'[18]

304G-H; Lord Bingham has suggested that the minority of Scottish judges in the new supreme court would make consideration of Scottish criminal appeals 'inherently unsuitable': *A New Supreme Court for the United Kingdom* (The Constitution Unit Spring Lecture 2002 pp8-9. This recognition of difference does not preclude cross-border co-operation in matters of law enforcement: *Burns v HMA* [2008] UKPC 63.

[17] The issue of the protective force of the article, and indeed the broader constitutional question of its claim to fundamental law status, has exercised the courts and the academy: *MacCormick v Lord Advocate* 1953 SC 396 (IH); *Gibson v Lord Advocate* 1975 SLT 134; *R (ex parte Jackson) v A-G* [2005] UKHL 56;TB Smith 'The Union of 1707 as fundamental law' [1957] PL 99; JBD Mitchell, *Constitutional Law* (2nd edn SULI 1968); N MacCormick 'Does the United Kingdom have a constitution' (1978) 29 NILQ 1; M Upton 'Marriage vows of the elephant: the Constitution of 1707' (1989) 105 LQR 79; N Walker and CMG Himsworth 'The poll tax and fundamental law' 1991 JR 45; N Walker 'Fundamental Law' in NR Whitty (ed) *The Laws of Scotland* Vol 5 (Reissue 2002); *Lord Gray's Motion* 2000 SC (HL) 46;[2002] 1 AC 124; KJ Keith 'Sovereignty at the Beginning of the 21st Century: Fundamental or Outmoded?' 63 (2004) *CLJ* 581; T Mullen 'Reflections on *Jackson v Attorney General*: Questioning Sovereignty' 27 (2007) Leg Stud 1; I McLean and I McMillan 'Professor Dicey's contradictions' [2007] PL 435; V Bogdanor 'The consistency of Dicey: a reply to McLean and MacMillan' [2008] PL 19.

[18] It is worthy of note in passing that the provision relating to the Court of Session stated that the United Kingdom parliament might make '…Regulation for the better Administration of Justice'; whereas, in the case of the Court of Justiciary, the provision is only that the new parliament may make such regulations, there is no mention of '…the better Administration of Justice.' Ford notes that there is a degree of symmetry between Arts XVIII & XIX, and suggests that the '…parallel treatment of the supreme civil and criminal courts tends to strengthen the view that the intention in the previous article was to include the laws governing the criminal prosecution of private parties among the "Laws which

Yet, important as these provisions for the continuity of the Scottish 'Supream Courts of Justice' are, the more ambiguous provision is that which relates to the prohibition against Scottish causes being heard by courts constituted in Westminster Hall. This provision has proven somewhat problematic, at least insofar as it provides potential for debating the intent of the drafters of the Treaty: did they purport to disallow appeals beyond Scotland altogether; or, did they envisage appeals to the new Parliament, and hence left the matter silent beyond the prohibition on Scottish causes at Westminster Hall? The significance of the reference to Westminster Hall is that the main central English courts were located in Westminster Hall, and so a specific prohibition against cases being heard in Westminster Hall would assuage concerns that Scottish appeals would be heard by English courts. However, and indeed crucially, the House of Lords did not sit in Westminster Hall, and therefore there was no, clearly expressed, written prohibition against Scottish appeals to the House of Lords.

The Scots commissioners in previous aborted union negotiations had attempted to prevent any appeals being heard in England, while the English commissioners had suggested that the House of Lords ought to be able to hear such appeals.[19] However, it is pointed out by Ford that times had changed by the early eighteenth century, as popular discontent with the Lords of Session had resulted in the Claim of Right, and

concern private Right"' JD Ford 'The Legal Provisions in the Act of Union' 2007 CLJ 106,119. It is at least possible that the added requirement that the Parliament might only alter aspects of the Court of Session for the 'better Administration of Justice' may suggest otherwise.

[19] JD Ford 'The Legal Provisions in the Act of Union' 2007 CLJ 106, 122-23.

greater clamour for some kind of recourse to parliament.[20] And, on that basis, it would appear that the intention of the articles in question was not to bar appeals to the new parliament.[21] Indeed, the contemporary debate considered the perceived danger posed to the Scottish courts and the law they administered; yet, that threat was offset by the assumption that the new parliament's powers would extend only to review of process (not unlike judicial review today), and the need to go to England might even operate as a deterrent, thereby underlining the authority of the Scottish institutions.[22] Perhaps the most telling aspect of the debate is summed up by Ford: 'What no one seems to have welcomed was the prospect of decisions of the session being subjected to substantive review by the House of Lords.'[23]

It is readily apparent that the Union of 1707 represents a highly important moment in the historical development of the jurisdictional structure of the Scottish legal system. The protections afforded to Scottish law in the Treaty of Union are an enduring testament to the attempts of those long since deceased to safeguard the notion of Scottish law in Scottish courts. However, no less apparent is the difficulty inherent in

[20] JD Ford 'The Legal Provisions in the Act of Union' 2007 CLJ 106, 123. Of course, the idea of an appeal to Parliament did not arise with the Claim of Right, and was of considerably older pedigree. By the time that Balfour was writing, he was able to state: 'Gif ony man thinkis him heavily hurt be the Lordis of sessioun, in pronuncing of ane decreit aganis him, he may protest for remeid of law, and appeal to the parliament.' *Cunynghame v Vicar of N.* 18th January 1532 in PGB McNeill *The Practicks of Sir James Balfour of Pittendreich* (Stair Society 1962) 268. However, Ilay Campbell observed that this early precedent faded from the legal consciousness: 'But so seldom was the right, though thus established, put in practice, that before the reign of Charles II, it fell into to complete disuse, insomuch that some of the first lawyers in the country maintained that no such right had ever existed. Balfour's book not being then in print, the memory of the precedent recorded by him had been lost.' Court of Session *The Acts of Sederunt of the Lords of Council and Session* (J Thomson Jun & Co Edinburgh 1811) Preface xxx. It is also clear that Lord Stair was no fan of the jurisdiction, and his understanding of the protestation for remeid of law after the Claim of Right is a narrow one: Stair IV. 1. 56-60.

[21] JD Ford 'The Legal Provisions in the Act of Union' 2007 CLJ 106, 124; AJ MacLean 'The 1707 Union: Scots Law in the House of Lords' (1984) 5 Journal of Legal History 50; D Defoe *A Collection of Original Papers and Material Transactions, Concerning the Late Great Affair of the Union between England and Scotland* (J Knapton N Clifee and J Baker London 1712).

[22] JD Ford 'The Legal Provisions in the Act of Union' 2007 CLJ 106, 124-25.

[23] JD Ford 'The Legal Provisions in the Act of Union' 2007 CLJ 106, 125.

trying to discern the intent of those who drew up and voted on the treaty, and, ultimately, the effect of that difficulty upon those who would come to be governed by the Union's terms. Clearly there were disagreements and disparate intentions which were not necessarily embodied within the finalised terms of the treaty.

Compounding the inevitable disconnect between the intentions of all concerned and the concrete manifestation of those intentions, is the fact that it seems clear that certain assumptions about the limited character of any recourse to the London courts, almost axiomatic in their strength, were made about the future operation of the Treaty provisions. With hindsight such assumptions can seem naïve. The use of the term naïve is not intended to be negative—this is not a qualitative evaluation of the historical development of this jurisdiction, it is a descriptive one. As a matter of description therefore, it seems clear that the subsequent development of the appellate jurisdiction did not equate with the intentions of contemporary Scottish legal opinion. Yet it is equally clear that the subsequent development of the appellate jurisdiction of the House of Lords is not inconsistent with these provisions: any gap between an intention and the resulting manifestation of that intention does not undo the process by which the result was reached. Therefore, it is to the subsequent interpretation of the Treaty of Union, and indeed subsequent parliamentary activity, that we now turn.

C Post-Union Development: The Eighteenth Century

Whatever may have been the intention of the framers of the Treaty of Union, it soon became clear that Scottish litigants would take advantage of the ability to take cases to

the House of Lords in London.[24] The terminology of the time was that the pursuer might 'protest for Remeid[25] of Law'.[26] It is clear that litigants intended to appeal to the new British parliament before it had even come into existence.[27] It would appear that in the period between the dissolution of the Scottish Parliament, and the constitution of the new British Parliament, these litigants were hedging their bets by providing for their protestations to be heard in the hypothetical successor 'judicatory' of the Scottish Parliament.

The new parliament met for the first time on 23 October 1707, and thereafter a Scottish litigant would simply assert that they '…appealed to the British parliament.'[28] As MacLean notes the significance of such early cases lies in the fact that they are ones in which the appeal notices were being lodged in the Court of Session. This all changed with the important case *Rosebery v Inglis*, where the House of Lords heard the petition and appeal from the decree of the Lords of Council and

[24] The status of the House of Lords as the final court of appeal within the English legal system was long established by this point: FW Maitland *The Constitutional History of England* (CUP 1908); W Holdsworth *A History of English Law* (Methuen London 7th edn 1969); LO Pike *A Constitutional History of the House of Lords* (Macmillan & Co London 1894)*;* L Blom-Cooper and G Drewry *Final Appeal: A Study of the House of Lords in its Judicial Capacity* (Clarendon Press Oxford 1972) 18 *et seq;* R Stevens *Law and Politics: The House of Lords as a Judicial Body 1800-1976* (Weidenfield and Nicolson London 1978) 6 *et seq*; T Beven 'The Appellate Jurisdiction of the House of Lords' (1901) 17 LQR 155; GJ Thompson 'The Development of the Anglo-American Judicial System' (1931-1932) 17 Cornell LQ 395; RH Maudsley 'The House of Lords' (1960-1961) 15 U Miami L Rev 174.

[25] This is given various spellings throughout the contemporary sources.

[26] Ilay Campbell observes: 'The distinction between *protesting* for remeid of law, and *appealing*, consisted only in this, that in the one form, process and execution still went on, while in the other all proceedings were stopt, until the appeal should be discussed. There might be some difference in point of expediency between the one form and the other, but the right was, in other respects, substantially the same, and Balfour's authority makes no distinction.' Court of Session *The Acts of Sederunt of the Lords of Council and Session* (J Thomson Jun & Co Edinburgh 1811) Preface xxxii.

[27] See *Lady Mary Bruce v Earl of Kincardine* Fountainhall ii 368 where the litigant entered '…a protestation for remead of law…to the Queen and parliament, and after the union to their next competent judicatory for determining such appeals.' cited in AJ MacLean 'The 1707 Union: Scots Law and the House of Lords' (1984) 5 Journal of Legal History 50, 50. See also *Lady Bradisholm v Muirhead* Fountainhall ii 381.

[28] See AJ MacLean 'The 1707 Union: Scots Law and the House of Lords' (1984) 5 Journal of Legal History 50, 51.

Session on 16th February 1708, and ordered the defender Inglis to give written answers.[29] A committee was constituted to consider the mechanics of the procedure to be followed,[30] which duly reported in the following manner:

> It is Ordered, by the Lords Spiritual and Temporal in Parliament assembled, That the Respondent Sir *John Inglis* and all other Respondents to Appeals from *Scotland* do put in their Answers, as Respondents do in Cases of Appeals from the Courts in *England*, within the Time appointed by the House; and that the Clerk Register and his Deputies the Principal Clerks of Session shall give authentic Copies of the Proofs and Extracts of the Proceedings, to either Party that shall require them, at his proper Charge, to be made Use of at the Bar of this House: And it is further Ordered, That Sir *John Inglis* hath hereby further Time allowed him, for answering to the Appeal of the Earl of *Roseberie*, until *Tuesday* the Twentieth Day of *April* next, at Eleven a Clock.[31]

One may note the telling turn of phrase that 'all other Respondents to Appeals from *Scotland*' would follow this procedure, and indeed, the orders directed the Clerks of Session to provide the necessary materials for the consideration of

[29] *House of Lords Journal* Vol 18 16th February 1708 p 464 (http://www.british-history.ac.uk/report.aspxcompid=29629).
[30] *HOUSE OF LORDS JOURNAL* Vol 18 24th March 1708 p 550 (http://www.british-history.ac.uk/report.aspxcompid=29659#s10).
[31] *HOUSE OF LORDS JOURNAL* Vol 18 27th March 1708 p 555-56 (http://www.british-history.ac.uk/report.aspxcompid=29662).

such appeals.[32] This decision represents the beginning of substantive procedures for appeals from Scotland.[33] Thus, the 'first' Scottish case to be heard by the House of Lords following the Union was *Rosebery* and not, as is sometimes asserted, *Greenshields v Provost and Magistrates of Edinburgh*.[34] We have seen that the *Rosebery* case first appeared in February 1708, and may note in passing further appeals from 'North Britain' in December 1708.[35] The first example of the House of Lords reversing the Court of Session appears to be 10th March 1709;[36] however, four days later the Court of Session's decree in another case was affirmed.[37] At the same time, appeals were still being presented in Edinburgh for consideration in the British Parliament.[38]

These pioneering appeals helped to settle the existence of the jurisdiction, but they also ensured that the procedures extant in such appeals were also developed. Thus, we have already noted that the House of Lords ordered the Clerks of Session to cooperate with appellants wishing to appeal. In addition to this, it is noted by Walker that appeals to the House of Lords from Scotland were precisely that, and not, as in some English cases, hearings on writs of

[32] This seems a direct result of the apparent refusal of the clerks to co-operate with the Earl at an earlier point in appeal: *HOUSE OF LORDS JOURNAL* Vol 18 6th March 1708 p 499 (http://india.british-history.ac.uk/image-pageScan.aspxpubid=119&sp=1&pg=499).
[33] MacLean notes that correspondence from the time suggest that the *Rosebery* case was looked upon as something of an opportunity for the Lords to issue something akin to the modern day practice direction: AJ MacLean 'The 1707 Union: Scots Law and the House of Lords' (1984) 5 Journal of Legal History 50, 62-63.
[34] See on this generally: RS Tompson 'James Greenshiels and the House of Lords: A Reappraisal' in WM Gordon and TD Fergus *Legal History in the Making* (Proceedings of the Ninth British Legal History Conference Glasgow 1989 Hambledon Press London) 109 et seq.
[35] *Gray v Hamilton HOUSE OF LORDS JOURNAL* Vol 18 14th December 1708 591; *Muirheid v Muirheid*; HOUSE *OF LORDS JOURNAL* Vol 18 16th December 1708 pp 591-592.
[36] *Gray v Hamilton HOUSE OF LORDS JOURNAL* Vol 18 659-660.
[37] *Muirhead v Muirhead HOUSE OF LORDS JOURNAL* Vol 18 14th March 1709 666. Other cases in 1709 included an appeal from the Court of Exchequer: *Brand v Ogilvie HOUSE OF LORDS JOURNAL* Vol 18 10th & 11th February 1709 635.
[38] See Fountainhall ii 496; 521; 499.

error.[39] The House of Lords also began to order awards of costs, which were to be given effect to by the Court of Session '…by the same Rules and Methods as Costs given by them are to be levied.'[40]

Perhaps most significant of all however, was the order handed down on 19th April 1709 which stated 'It is Ordered, by the Lords Spiritual and Temporal in Parliament assembled, That, after an Appeal shall be received by this House, from any Sentence or Decree given or pronounced in any Court in *Scotland*, and an Order made by this House for the Respondent to answer the said Appeal, and Notice of such Order duly served on the Respondent; the Sentence or Decree so appealed against, from such Time, ought not to be carried on into Execution by any Process whatsoever."[41]

The following years saw a steady increase in the number of appeals, with the result that by the end of the eighteenth century the House of Lords could justifiably be described as '…to all intents and purposes a Scottish Court.'[42] In the early-nineteenth century almost 80% of the House of Lords's business originated in Scotland, and the sheer numbers of Scottish appeals had become a

[39] DM Walker *A Legal History of Scotland* (T & T Clark Edinburgh 1998 Vol 5) 448. In this he follows, very closely, the like observation in R Stevens *Law and Politics: The House of Lords as a Judicial Body 1800-1976* (Weidenfield and Nicolson London 1978) 8-9.
[40] *Kinnard v Lyon HOUSE OF LORDS JOURNAL* Vol 19 22nd March 1711 202.
[41] *Mackenzie v Brand HOUSE OF LORDS JOURNAL* Vol 18 19th April 1709 713. The case itself rumbled on: Vol 19 26th January 1710 50 & 31st March 1710 135.
[42] L Blom-Cooper and G Drewry *Final Appeal: A Study of the House of Lords in its Judicial Capacity* (Clarendon Press Oxford 1972) 31. See DM Walker *A Legal History of Scotland* (T & T Clark Edinburgh 1998 Vol 5) 448-449 for details of the numbers from a Scottish perspective, and a detailed account of the procedural machinery which accompanied the new jurisdiction.

major problem for the effective administration of justice across Britain.[43] This arbitral logjam forced changes in the way in which the jurisdiction operated. From an early stage, entire days had to be devoted solely to judicial work, and on such days the decision making process was often for all intents and purposes solely exercised by the Lord Chancellor.[44] However, the problem was not only one of securing adequate judicial manpower. To compound this, in some cases, especially those of political significance, lay peers would take an active part in decisions.[45]

A number of reasons have been given for the large numbers of Scottish appeals to the House of Lords. Some have suggested that the stay of execution granted to an appellant to the House of Lords was attractive,[46] and appeal was used as a

[43] The House was hearing ten times as many Scottish cases as English and Irish cases and by the end of 1808 there were 139 Scottish cases awaiting hearings.R Stevens *Law and Politics: The House of Lords as a Judicial Body 1800-1976* (Weidenfield and Nicolson London 1978) 15.

[44] R Stevens *Law and Politics: The House of Lords as a Judicial Body 1800-1976* (Weidenfield and Nicolson London 1978) 9.

[45] See the unflattering descriptions given by A Dewar Gibb *Law from Over the Border* (W Green & Son Ltd Edinburgh 1950) 8-10; TB Smith *British Justice: The Scottish Contribution* (Stevens & Sons Ltd London 1961) 67. The problem of lay participation in the judicial business of the House of Lords was not confined to Scottish appeals, a point well illustrated as late as 1844 when lay peers threatened to vote with the minority of the law lords: *O'Connell v R* (1844) 11 Cl & F 155; 8 ER 1061. In the end a senior member of the cabinet implored the lay peers not to vote, and while another cautioned the House that if lay peers voted, he would feel he that would have to do likewise, though reluctantly, 'for I should look upon the course of proceeding which would oblige me so to act, to be one of the most calamitous nature to this House and the country.'(p. 424) The lay peers withdrew, and the House of Lords was essentially rendered a professional court, though lay peers without a vote could be used to form a quorum. The story is well told in R Stevens *Law and Politics: The House of Lords as a Judicial Body 1800-1976* (Weidenfield and Nicolson London 1978) 32-34; RE Megarry 'Lay Peers in Appeals to the House of Lords' (1949) 65 LQR 22.

[46] DM Walker *A Legal History of Scotland* (T & T Clark Edinburgh 1998 Vol 5) 448. The same author points out correctly that the suspension of execution is in fact contrary to the Claim of Right 1689 c. 28, the relevant provision of which reads: 'That it is the right and priviledge of the subjects to protest for remeed of law to the King and Parliament against Sentences pronounced by the lords of Sessione Provydeing the samen Do not stop Execution of these sentences.' This reflects Ilay Campbell's earlier comments about the distinction between seeking remeid of law, and an appeal. The non-suspensive nature of the right to remeid of law was of the first importance to Stair (IV.1. 61), where he explains the difference between an appeal and a protestation for remeid of law.

delay mechanism.[47] Another factor was domestic dissatisfaction with the judicial process in Scotland, and more particularly the perceived partiality, to put the matter lightly, of the Court of Session.[48] The manner in which justice and the machinery of justice operated was permeated by the intrigues of powerful political dynasties.[49] This unfortunate domestic backdrop may well have encouraged litigants to appeal to an 'external' appellate body which, in perception at least, would be less susceptible to domestic intrigue or influence.[50] There have also been suggestions that in addition to the partial implementation of justice, the quality of adjudication itself was not as high as could be expected. In particular, the forms of process were in such a state as to allow the wily litigant to beguile the Scottish court, which seldom gave reasons for its decision,[51] and then gamble with some hope that the House of Lords would be unable to comprehend the antiquated intricacies of the Scottish procedure.[52] Whatever inspired the groundswell of appeals, by the end of the eighteenth century the need for change had become clear, and so the stage was set for the reforms of the judicial machinery of Scotland in the nineteenth century.

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[47] Ilay Campbell in Court of Session *The Acts of Sederunt of the Lords of Council and Session* (J Thomson Jun & Co Edinburgh 1811) Preface xliii-xliv.
[48] A Dewar Gibb *Law from Over the Border* (W Green & Son Ltd Edinburgh 1950) 11-12.
[49] See especially N Phillipson *The Scottish Whigs and the Reform of the Court of Session 1785-1830* (The Stair Society Edinburgh 1990) Chapter 1.
[50] That credence of such a view is borne out by the fact that in the 19th century Henry Cockburn could remark 'To imagine that the evil is cured by sending up *any* common Scotch judge to London, with all his local prejudices operating, *but not seen*, is ludicrous....The great thing is to rescue us from the jaws of *one native* permanently acting as the House of Lords to us.' Cited in N Phillipson *The Scottish Whigs and the Reform of the Court of Session 1785-1830* (The Stair Society Edinburgh 1990) 142-43; see also the comments that 'With a[n] English Chancellor we are safe so far as impartiality is concerned.' *Supra*.
[51] It has even been suggested that the Scottish appellant went to the House of Lords seeking guidance on the reasons for the decision in the Court of Session, which would not publicise its reasons: Lord Eldon cited in L Blom-Cooper and G Drewry *Final Appeal: A Study of the House of Lords in its Judicial Capacity* (Clarendon Press Oxford 1972) 32.
[52] N Phillipson *The Scottish Whigs and the Reform of the Court of Session 1785-1830* (The Stair Society Edinburgh 1990) 85-86.

D Changes to the Court of Session

At the outset of the nineteenth century any doubts, inspired by the Union settlement and its implementing legislation, as to the Scottish appellate jurisdiction of the House of Lords were long since dispelled. Not only had the right to appeal been firmly established, so too had the necessary procedural mechanisms supporting such a jurisdiction. In fact, in many ways, the most important systemic issue facing Scottish law was the way in which to handle the spectacularly popular growth in the jurisdiction. Furthermore, the issue was not only of the greatest importance to Scottish lawyers—the massive Scottish caseload for the House of Lords was threatening to unhinge the administration of justice in England as well as in Scotland. Therefore, the eyes of many political constituencies were beginning to focus upon these Scottish appeals, and indeed upon the court whence they came—the Court of Session. It is necessary to give some attention to the structure of the Court of Session, and the way in which it was to be reformed, in order to provide a complete picture of the appellate jurisdiction to the Lords.

In 1800 the Court of Session looked much as it had done for centuries—there were fifteen judges, or Senators, who undertook the judicial work of the court. Of the fifteen judges, all but the Lord President took turns to sit in the Outer House of the court; while the Inner House sat with at least nine judges. Therefore, the court essentially sat *en banc* and was known by various nicknames such as the ‘Haill Fifteen’, or the ‘Auld Fifteen’. This arrangement was becoming problematic by the

early nineteenth century. Beyond the age-old complaint that if a certain judge had not been absent a party may have won, a more profound problem was manifesting itself: the judges frequently based their decisions upon quite different grounds, and indeed prevented publication of those grounds.[53] In addition to the judicial reasoning process, and no doubt linked to it, the forms of process and tradition of written pleadings were taking a heavy toll upon the system, with much judicial time being devoted to refining the arguments of the litigant. It was becoming clear that the system was incapable of providing justice in an efficient and reasonable manner, especially against the backdrop of industrialisation and the massively increased size and importance of commercial causes.

This state of affairs, which appears to have been the bane of many but the fault of none, could not be allowed to continue. There were a number of reforms proposed, ranging from tinkering with judicial numbers, experimentation with juries, reconsidering the equity/law divide, new courts, all the way to having Scottish law lords.[54] The pressure for reform was made all the stronger by the unusually strong London interest in reform, prompted mainly by the need to deal with the sheer number of Scottish appeals, which were beginning to clog up the business of the Lords.[55] The leading text dealing with the initial Whig reforms of the Court of Session

[53] N Phillipson *The Scottish Whigs and the Reform of the Court of Session 1785-1830* (The Stair Society Edinburgh 1990) 53.
[54] The story is most fully told in N Phillipson *The Scottish Whigs and the Reform of the Court of Session 1785-1830* (The Stair Society Edinburgh 1990) 141 *et seq*.
[55] The Scottish jurisdiction of the House of Lords was popular, at least among many leading lawyers of the time: 'It cannot be denied that the experiment [appeals to the House of Lords], though apparently a bold one, and much objected to by some of the old lawyers at the time, on account of the trouble and expence attending it, has completely succeeded; and after the trial of a full century, it is believed there is not now any reasonable man in Scotland who would wish to see an alteration...' Ilay Campbell in Court of Session *The Acts of Sederunt of the Lords of Council and Session* (J Thomson Jun & Co Edinburgh 1811) Preface xxxvi. This glowing assessment continues for another three pages, however, he then highlights certain subject matters that should only be argued before the House of Lords by

details the disparate solutions which were tested, and shows the extent of English interest in solving the perceived problems of the Court of Session.[56] What emerged from these varying solutions was a very different structure for the Court of Session, and in addition to this, important reforms were made with regard to appeals to the House of Lords.

Therefore, by virtue of the Court of Session Act 1808, the Court of Session was divided into the Inner and Outer Houses, with the former being split into two divisions to handle appellate work. Of perhaps more importance for present purposes were two important changes which the Act made to appeal procedures to the House of Lords. First, there would no longer be an appeal from interlocutory judgments of the Court Session, unless they gave leave so to do; and, secondly, the automatic stay of execution of the judgment of the Court of Session was removed. These reforms were made with the intention of improving the quality of justice administered in Scotland, with the additional vested interest of reducing the number of Scottish appeals to the House of Lords. The plan worked to some extent, though it took time.[57]

These early nineteenth-century reforms represented domestic Scottish changes which regulated appeals from the Court of Session to the House of Lords—the reform was of what went to the Lords, and how it got to there - as opposed to reform of the House of Lords itself. From the middle to end of the nineteenth century, the emphasis for

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Scottish counsel, before stating: '…whereas, contracts and commercial causes can be entirely trusted to English professional men as *jus gentium*.'

[56] N Phillipson *The Scottish Whigs and the Reform of the Court of Session* (The Stair Society Edinburgh 1990).

[57] See the account in R Stevens *Law and Politics: The House of Lords as Judicial Body, 1800-1976* (Weidenfeld and Nicolson London 1979) p 14 *et seq*.

reform shifted to examine the nature, and indeed very existence, of the House of Lords as an ultimate juridical arbiter.

We may also note that it was in this period that the theoretical possibility of a Scottish appellate criminal jurisdiction was finally conclusively denied by the House of Lords.[58] The possibility of a criminal appeal to the old Scottish parliament was at best dubious, and by the time of the Union it seems to have been totally disregarded. However, while we might say that the latter part of the nineteenth century saw the final and conclusive rejection of the possibility of criminal appeals,[59] it seems that the prospect of appeals from the High Court of Justiciary was, in reality, foreclosed long before this.

The important *Bywater*[60] case, which essentially amounts to a rejection of any criminal jurisdiction in the latter eighteenth century, is foreshadowed by a seldom

[58] *Mackintosh v Lord Advocate* (1876) 3 R (HL) 34; (1876-77) LR 2 App Cas 41 (HL). The matter had been canvassed at some length in previous cases, perhaps the most important of which was *Bywater v Lord Advocate* (1781) 2 Paton 563; interestingly, there seems to have been at least one anomalous example of a successful criminal appeal: *Magistrates of Elgin v Ministers of Elgin* (1713) Robertson 69. In the former case the leading speech is that of Lord Mansfield, who undertakes a detailed examination of the possibility of a criminal appeal before the Union and after, reaches the conclusion that there is no precedent at all for a criminal appeal from the High Court of Justiciary.

[59] As if the *Mackintosh v Lord Advocate* (1876-77) LR 2 App Cas 41 (HL) case were not conclusive enough, the matter was put beyond all doubt by statute: Criminal Procedure (Scotland) Act 1887 s 72; Criminal Appeal (Scotland) Act 1926 s 17 (1); Criminal Procedure Act (Scotland) 1975 s 262 & 268. The position today is regulated by the Criminal Procedure (Scotland) Act 1995 s 124 (2), as amended to allow for devolution issue appeals (Scotland Act 1998 (Consequential Modifications) (No.1) Order 1999/1042 Sch 1 (I) para 13 (6) (b)). This does not bar recourse to the *nobile officium* of the High Court of Justiciary when the proceedings are not solemn: *Express Newspapers plc Petrs* 1999 JC 176 (5 Judges). For a recent example of refusing leave to appeal a devolution issue decision on the basis that it would represent nothing more than a criminal appeal see: *Fraser v HMA* [2009] HCJAC 27. On the history of the criminal jurisdiction, the leading treatment is AJ MacLean 'The House of Lords and Appeals from the High Court of Justiciary 1707-1887' 1985 JR 192.

[60] *Bywater v Lord Advocate* (1781) 2 Paton 563.

mentioned[61] decision reported by MacLaurin.[62] In *HMA v Murdison*[63] the convicted prisoners presented a petition of appeal to a committee of the House of Lords which, on 10th March 1773, refused to hear the appeal. Such was the strength of the decision MacLaurin was moved to state 'Thus was the great question, as to the competency of appeals from the court of justiciary, at last determined in the negative.'[64] Further, the importance of the decision, its contextual background, and indeed the manner in which it was reached, are fully set out. The account given by MacLaurin includes opinions from the English Attorney-General and the Lord Advocate stating that there was no appeal from the Justiciary.[65] The Lord Advocate's opinion states clearly that:

> '…there is not in any one book of authority in our law, the least hint or insinuation, that any appeal lay from the court of justiciary to the parliament of Scotland…no trace of any such appeal has been discovered. This is stronger than the opinion of a hundred lawyers; because it ascertains the fact, that no such appeal was ever taken; and in this case the fact ascertains the law. The instances of capital, and other sentences, for all sorts of crimes, pronounced by the courts of justiciary, are innumerable, and many of them against persons of rank and fortune; yet no such method of suspending or avoiding these sentences was ever attempted; which shows it has been the universal opinion of the nation,

[61] It is mentioned in passing by Lord O'Hagan in *Mackintosh v Lord Advocate* (1876) 3 R (HL) 34, 41; drawing perhaps upon its use in the Lord Advocate's argument in the same case: *Mackintosh v Lord Advocate* (1876-77) LR 2 App Cas 41 (HL) 54.
[62] J MacLaurin *Arguments and Decisions in Remarkable Cases before the High Court of Justiciary and Other Supreme Courts in Scotland* (J Bell Edinburgh 1774).
[63] *HMA v Murdison* (1773) MacLaurin 557. See also *HMA v Robertson* (1717) MacLaurin 60 where a criminal appeal was lodged by the Crown but not followed through.
[64] *HMA v Murdison* (1773) MacLaurin 557, 581.
[65] *HMA v Murdison* (1773) MacLaurin 557, 584-85.

> and of all lawyers throughout succeeding ages, that no such remedy was competent in law…When the Revolution gave the people of Scotland an opportunity of vindicating their rights and privileges, and obtaining redress of grievances, the estates of parliament, in their claim of right 1689, do assert, "That it is the right and privilege of the subjects, to protest for remeid at law to the King and parliament, against sentences pronounced by the Lords of Session, provided the same do not stop execution of these sentences." This was thought necessary for the security of the property of the subjects; and was explained by the after practice to import a right of appeal from that court to the high court of parliament: but no such claim is made as to sentences pronounced in the high court of justiciary. The safety of the public depended upon the speedy trial and execution of criminals. The criminal law, and the forms of trial, were more fixed and certain; and, above all, the security which the subjects had by a jury-trial before the court of justiciary, and their last resort in all cases to the grace and mercy of the sovereign, were sufficient reasons for the estates of parliament to leave the jurisdiction of that court to remain upon the same footing as it had stood from the earliest period of our constitution.'[66]

Therefore, in addition to the clear lack of precedent for a criminal appeal,[67] we also can see here the giving of reasons why such a criminal appeal would not be allowed.

[66] *HMA v Murdison* (1773) MacLaurin 557, 585-87.
[67] See also *HMA v MacDonald* (1754) MacLaurin 154. In this case the prisoner being condemned to death sought to appeal: 'The petition of appeal lay upon the table of the House of Peers for some days; and it is informed by those who had best access to know that case, that the Lord Chancellor advised

The protection of stronger procedures, trial by jury, and the ultimate prerogative of mercy vested within in the Crown were considered sufficient protections to render an appeal superfluous, and indeed when considered against the perceived public protection by speedy execution, almost dangerous.[68] Therefore, although the matter was finally put beyond doubt in the nineteenth century, the potential for a criminal appeal, as a matter of history, appears to have been foreclosed long before the *Mackintosh* decision.[69]

E Changes to the House of Lords

The early nineteenth century had seen legislative interventions aimed at the reform of the Court of Session, with the objective of reducing the number of appeals to the House of Lords.[70] As was noted above, these reforms, alongside other procedural changes within the House of Lords, were effective in time in reducing the number of appeals from Scotland.[71] Within these procedural reforms lay the seeds for more profound changes in the way in which the House dealt with judicial business—the need to draw up a dedicated rota system to deal with the backlog of predominantly

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with the Duke of Argyle, then Lord Justice-General of Scotland, the Attorney-General, and the Lord Advocate; and they were all of the opinion the appeal was not competent.' MacLaurin 590.

[68] The criminal jurisdiction of the House of Lords as regards English appeals was also severely limited, in part due to the idea of the sanctity of the jury decision. Indeed, it was only with the Administration of Justice Act 1960 that the jurisdiction began to expand again. On this see L Blom-Cooper and G Drewry *Final Appeal: A Study of the House of Lords in its Judicial Capacity* (Clarendon Press Oxford 1972) 29-31.

[69] The leading writers of authority seem without exception to deny such a jurisdiction as well: cf W Forbes *The Institutes of the Law of Scotland* (J Mosman & Co Edinburgh 1730) 224.

[70] Court of Session Act 1808; Administration of Justice (Scotland) Act 1808; Proceedings of the Court of Session (Scotland) Act 1810; Court of Session (Scotland) Act 1825.

[71] R Stevens *Law and Politics: The House of Lords as Judicial Body, 1800-1976* (Weidenfeld and Nicolson London 1979) 18-19.

Scottish appeals, prepared the ground for a more professionalised approach to the judicial business of the House more generally.[72]

The professionalization of the judicial function of the House of Lords appears to have occurred with the change of Lord Chancellor from Eldon and Lyndhurst to Brougham.[73] These changes contributed to the greater identification of the House of Lords and Appeal Committee as courts of law which were '…increasingly independent of the legislative and executive organs whose names they bore.'[74] With this change in character came a change in the attitude of the English legal profession. This was reflected in the fact that 1834 was the first year in which more English cases were decided in the House of Lords than Scottish cases.[75] That year was also notable for Brougham's attempt to substantially merge the House of Lords, in its judicial role, and Judicial Committee of the Privy Council. However, the bill came to nothing with the fall of the government that year.[76]

The next important judicial reforms, which took place against a backdrop of massive changes to the fundamental political nature of the country, to touch upon Scottish

[72] This is Stevens' thesis, who suggests that the necessary procedural changes posed fundamental questions concerning the judicial capacity of the House of Lords: in particular R Stevens *Law and Politics: The House of Lords as a Judicial Body 1800-1976* (Weidenfield and Nicolson London 1978) 21-23.
[73] R Stevens *Law and Politics: The House of Lords as a Judicial Body 1800-1976* (Weidenfield and Nicolson London 1978) 25-27.
[74] R Stevens *Law and Politics: The House of Lords as a Judicial Body 1800-1976* (Weidenfield and Nicolson London 1978) 27.
[75] 27. However, one should not place undue emphasis upon this single year—Steven's notes that in 1835, of the 58 cases heard, 42 were Scottish; and, in the years 1840-1845 of the average 35 cases a year, the average proportions were 20 from Scotland, 9 from England, and 6 from Ireland: R Stevens *Law and Politics: The House of Lords as a Judicial Body 1800-1976* (Weidenfield and Nicolson London 1978) 30 n 130.
[76] R Stevens *Law and Politics: The House of Lords as a Judicial Body 1800-1976* (Weidenfield and Nicolson London 1978) 28.

affairs came in the 1850s. The appointment of a select committee in 1856 to consider the appellate jurisdiction of the Lords was the result of political discontent with the operation of the House of Lords as a court of law generally. The political climate of the time was changeable—a multitude of unconnected concerns were abroad. Among them was the possibility of Scottish judicial representation in whatever arrangements were to emerge. It would appear that the evidence presented to a select committee was contradictory, but a majority of the key Scottish lawyers giving evidence were in favour of a Scottish judicial member of the house.[77] The recommendations of the committee were encapsulated in a weak reform bill, which never became an Act.

However, despite the failure to reform in the 1850s, the judicial function of the House of Lords, and the related Privy Council jurisdiction, remained a target for the reforming spirit of the 'Utilitarians'.[78] In the latter 1860s a Royal Commission on the Judicature was established, which recommended the creation of a Supreme Court, which would have a High Court and Court of Appeal. The High Court would be split into five divisions akin to the existing courts of the common law and equity. Yet, these recommendations, and the attempts to implement them, did not touch directly upon the role of the House of Lords. At this time, there was no discussion of the cessation of appeals from Scotland to the House of Lords.[79] This was because the Commission was concerned with the English court system, and not the jurisdiction of the House of Lords or Judicial Committee of the Privy Council. In 1872 a Select

[77] R Stevens *Law and Politics: The House of Lords as a Judicial Body 1800-1976* (Weidenfield and Nicolson London 1978) 43.
[78] R Stevens *Law and Politics: The House of Lords as a Judicial Body 1800-1976* (Weidenfield and Nicolson London 1978) 47.
[79] It appears that there were still a high number of Scottish appeals according to Stevens: In 1869 of the 24 appeals dealt with 8 were Scottish. In 1870 there were 31 appeals from Scotland—out of a total of 51. This was not without attempted remedy: the House of Lords Appellate Jurisdiction Bill 1871 was introduced, without success, to limit appeals according to value or leave requirements.

Committee was appointed to consider the House of Lords and Privy Council jurisdictions—which recommended a unified Judicial Committee of the two bodies.[80] In 1873 there appeared a Judicature Bill which was to implement the Royal Commission's plan for a Supreme Court. However, in addition to this, the Court of Appeal was to be strengthened, with the concomitant effect that a second appeal would be unnecessary and so the House of Lords jurisdiction would be removed. The position as regards Scotland was less clear—Scottish appeals were to continue to the House of Lords, though it seems clear that they were expected to either dry up or be transferred to the new Court of Appeal.[81] However, the bill was subsequently amended to provide that Scottish and Irish appeals would go to this Court of Appeal. This amendment proved to be a political miscalculation and was dropped so that Scottish and Irish appeals would still go to the House of Lords. The bill became the Supreme Court of Judicature Act 1873.

However, this somewhat fast and loose dealing in the location of the Scottish final appeal had not yet finished. A change of government meant that in 1874 a bill was again brought forward to end Irish and Scottish appeals to the House of Lords,[82] though by this time the planned Court of Appeal had been re-branded as the Imperial Court of Appeal. The court was also to be split into different divisions, with the larger to be senior and also responsible for Scottish appeals. However, this never made it onto the statute book, and legislation was brought forward to delay the effect of the

[80] R Stevens *Law and Politics: The House of Lords as a Judicial Body 1800-1976* (Weidenfield and Nicolson London 1978) 52.
[81] R Stevens *Law and Politics: The House of Lords as a Judicial Body 1800-1976* (Weidenfield and Nicolson London 1978) 52-53.
[82] Supreme Court of Judicature Act 1873 (Amendment) Bill of 1874.

1873 Act. After this point, there were no further legislative moves to remove the House of Lords's jurisdiction to hear Scottish appeals.

The enactment of Judicature Act 1876 ensured that the jurisdiction would continue. Importantly, these legislative provisions also created Lords of Appeal in Ordinary, and of the first two, one was a Scot.[83] Accordingly, the jurisdiction of the House of Lords had survived its most serious threat of the nineteenth century, and for the first time dedicated judges were paid to undertake the judicial business of the House. This model was the one which would survive, with the incremental addition of judicial manpower but broadly unaltered, for the rest of the House of Lords judicial life.

F Refinement of the Judicial Character of the Lords: Modern Times

The previous reforms associated with the jurisdiction of the House of Lords had, to a large but not exclusive extent, concentrated on an existential question: should the House of Lords should be a court of law at all? In the twentieth century, despite occasional academic and political suggestions that the House of Lords should not continue to have a judicial role, the appellate jurisdiction of the House of Lords was never seriously challenged.[84] However, the nature of the judicial function of the

[83] Lord Gordon.

[84] There have been a number of different challenges to the current arrangements from a Scottish perspective: A petition to the Scottish Parliament by an E Okutoro sought to remove the requirement that two counsel must sign a petition to attest to reasonableness on the basis that the requirement was a contravention of art 6 of the ECHR. The official advice regarding the petition suggested that such an action would be beyond the competence of the Scottish Parliament as the requirement was a standing order of a chamber of the United Kingdom Parliament, and as such was a reserved matter.

House of Lords was substantially altered throughout the century in profound ways. In many ways the formal regulation of Scottish appeals to the House of Lords did not change significantly; but the greater formalisation of the distinction between law and politics meant that by the end of the twentieth century the House of Lords functioned as a substantively professional and impartial separate judicial organ. In this section an attempt has been made to give an short account of the broad cultural changes which affected the practice of the House of Lords, with particular reference to Scots law.

As has been observed above, the substantive jurisdiction and competence of the House of Lords was essentially settled by the end of the nineteenth century with the passage of the Appellate Jurisdiction Act 1876. Subsequent changes to the nature of appeals to the House of Lords from Scotland owe much to broader changes in the manner in which the House of Lords was conducting its judicial business. The formalised and substantive roles of the personnel within the House of Lords changed through the twentieth century, as indeed did the approach taken by the Law Lords in the execution of their jurisdiction. Such changes reflected a growing acceptance of the relevance and importance of an idea of the separation of powers, alongside changing jurisprudential approaches. These emerging cultural changes came to affect the nature of the House of Lords's judicial function, while at the same time, from a Scottish perspective at least, the formal delimitation of the jurisdiction itself remained unchanged.

(http://www.scottish.parliament.uk/business/research/petitionBriefings/pb-08/PB08-1214.pdf). In addition to this procedural challenge, a more fundamental challenge seeking to abolish the right of appeal altogether was mounted with the introduction, on the 29th September 2006, of the Civil Appeals (Scotland) Bill by Mr Adam Ingram MSP. The bill was ruled to be beyond the competence of the Scottish Parliament by the Presiding Officer on the basis that it would seek to alter arrangements of a chamber of the United Kingdom Parliament. The creation of the new Supreme Court means that the right of appeal no longer lies to a chamber of the United Kingdom Parliament.

At the beginning of the twentieth century the idea of a substantive separation of powers was not clearly articulated or applied with regard to the House of Lords in its judicial capacity. Arguably a *substantive* separation of powers did become entrenched through the century, but it was not until much later that a *formal* separation was to be achieved. Thus, although the participation of lay peers in judicial business had been dispensed with in the 19th century, the final court of appeal remained a chamber of the legislature. Indeed, the members of that 'court' were therefore necessarily members of both the legislature, and of the judiciary; while their leader, the Lord Chancellor, was the most senior judge, the speaker of the House of Lords, and a Cabinet minister. These formal roles remained the same throughout most of the twentieth century; however, substantive separation became clear in the latter stages of the twentieth century.[85] This trend was ultimately manifested in the creation of a new Supreme Court, and the emasculation of the Lord Chancellor's role.[86]

[85] This trend has not occurred without critical examination: J Webber 'Supreme Courts, independence and democratic agency' 24 (2004) Leg Stud 55.

[86] After a convoluted reform procedure, the Lord Chancellor is no longer the speaker of the House of Lords, and is not eligible to sit in the new Supreme Court, and he is no longer the head of the judiciary of England and Wales: Constitutional Reform Act 2005 Part 2. The current Lord Chancellor is the Rt Hon Jack Straw MP who takes the title along with that of Secretary of State for Justice. See R Smith 'Constitutional reform, the Lord Chancellor, and human rights: the battle of form and substance' 32 (2005) J Law & Soc 187; Lord Justice Scott Baker 'Judicial Independence and the Struggle between the United Kingdom Parliament and the Courts' 31 (2006) Okla City U L Rev 75; SF Fischer 'Playing Poohsticks with the British Constitution—The Blair Government's Proposal to Abolish the Lord Chancellor' 24 (2005-2006) Penn St Int'l L Rev 257; Lord Windlesham 'The Constitutional Reform Act 2005: ministers, judges and constitutional change: Part 1' [2005] PL 806 & 'The Constitutional Reform Act 2005: the politics of constitutional reform: Part 2' [2006] PL 35; R Stevens 'Reform in haste and repent at leisure: Iolanthe, *The Lord High Executioner* and *Brave New World*' 24 (2004) Leg Stud 1. Note the interesting question posed by Blom-Cooper: L Blom-Cooper 'Who is the most Senior Judge' [2008] PL 413.

Appendix II: Appeals to the Judicial Committee of the Privy Council

A Introduction

The Judicial Committee of the Privy Council is the judicial organ of the Privy Council, and as such is a court of final appellate jurisdiction for a number of different legal systems.[1] The exact nature of the appellate process depends upon the constitutional history of the legal system involved. Therefore, appeals from UK Overseas Territories, Crown Dependencies and Commonwealth states that have retained a right of appeal take the form of an appeal to Her Majesty in Council. Appeals from Republics take the form of an appeal to the Judicial Committee of the Privy Council. Furthermore, there are a number of other domestic appellate functions with which the Judicial Committee deals.[2]

The Judicial Committee also exercised a statutory jurisdiction[3] with regard to 'devolution issues' which may arise in respect of matters of competence pertaining to the devolved administrations within the United Kingdom.[4] Accordingly, the Judicial Committee of the Privy Council determined appeals from the Scottish legal system within this statutory framework. This new jurisdiction created *inter alia* three novel

[1] A useful account of historical and recent developments in the overseas jurisdiction of the Privy Council can be found in C Thompson-Barrow *Bringing Justice Home: The Road to Final Appellate and Regional Court Establishment* (Commonwealth Secretariat London 2008).
[2] The full details of the jurisdiction of the Privy Council is available on its website: http://www.privy-council.org.uk/output/Page32.asp
[3] *McDonald v HMA* [2008] UKPC 46 [13] Lord Hope; *Follen v HMA* 2001 SC (PC) 105 [9].
[4] Scotland Act 1998; Government of Wales Act 1998; Northern Ireland Act 1998.

and related judicial functions within the Scottish legal system: 1) a further, albeit indirect, appeal in criminal matters above the High Court of Justiciary; 2) judicial examination of devolved legislation beyond that of judicial review, more particularly, subjecting legislation derived from a democratically elected legislature to a competence test, and 3) an institutionally internalised human rights jurisdiction.

The Privy Council jurisdiction, or rather the issues arising from the operative definition of that jurisdiction, have proven controversial. The criticism of the jurisdiction, in large part, concentrated upon the effects of the provisions upon the administration of criminal justice in Scotland. The concern has been expressed that the Privy Council's devolution jurisdiction has represented a destabilising influence, especially with regard to criminal law. Further, that destabilising influence has not been confined to the potential denaturing of the law itself. The problems of the devolution issue jurisdiction have also reverberated through the practical administration of justice. One key aspect of this has involved the opening up of the role of the Lord Advocate to new, and perhaps unexpected, review processes with wide ranging implications.

Underlying all these new developments and concerns was the innovative constitutional approach of the new Privy Council jurisdiction. A jurisdiction predicated upon a human rights jurisprudence informed *vires* test was a challenge to traditional understandings of both British and Scottish constitutional law, and so it is perhaps unsurprising that the jurisdiction has been perceived as problematic. These broad thematic challenges were carried in the detail of the implementing statutory

rules, the intricacy of which has added to the problems. In order to understand the complexity of the appellate arrangements,[5] and their place within the broader constitutional context, it will be necessary to examine the statutory provisions and the subsequent interpretative decisions of the courts.

B Legislative Provisions

The legislative provisions which govern appeals and references to the Privy Council from the Scottish legal system are contained within the Scotland Act 1998. There were a number of distinct statutory routes by which a devolution issue may be considered by the Judicial Committee of the Privy Council.[6] The new United Kingdom Supreme Court has now assumed the devolution issue jurisdiction of the Privy Council, though the routes by which devolution issues can reach the United Kingdom Supreme Court are substantially the same.

It is clearly stated that lower courts[7] ***may*** refer a devolution issue to the Inner House of the Court of Session,[8] or with regard to criminal matters, to the High Court of Justiciary.[9] The provisions as regards the form and consequences of the determination

[5] The complexity in the area is reflected in the decision of the Calman Commission not to make a formal recommendation in this area: Commission on Scottish Devolution *Serving Scotland Better: Scotland and the United Kingdom in the 21st Century* (Final Report 2009) [5.36]-[5.37].
[6] See Lord Hope 'Judicial Committee of the Privy Council' in NR Whitty (ed) *Stair Memorial Encyclopaedia Reissue* [350]-[351]; http://www.privy-council.org.uk/output/Page32.asp.
[7] The language used is '…any court other than the House of Lords or any court consisting of three or more judges of the Court of Session…'. Also, a tribunal from which there is no appeal ***shall*** refer a devolution issue to the Inner House, and if there is an appeal from the tribunal, it ***may*** refer a devolution issue to the Inner House. Scotland Act 1998 s 98 Sch 6 para 8.
[8] Scotland Act 1998 s 98 Sch 6 para 7.
[9] Scotland Act 1998 s 98 Sch 6 para 9.

of a devolution issue at the higher level differ somewhat between the Inner House and the High Court of Justiciary. If a lower court makes a ***reference*** to the Inner House the latter cannot make a reference to the Supreme Court and must determine the devolution issue itself,[10] though this determination is the subject of an automatic right to appeal to the Supreme Court.[11] If, on the other hand, the devolution issue ***arises*** before the Inner House then it ***may*** refer the issue to the Supreme Court.[12] If, however, in these circumstances the Inner House decides to determine the issue itself, then an appeal lies as of right against any determination of that court, except in proceedings where there is no appeal to the Supreme Court from a court of three or more judges of the Court of Session, in which case permission of the Court of Session is required (or, failing that, permission of the Supreme Court). [13]

With regard to the High Court of Justiciary the position is more straightforward. As in the case of the Inner House, the High Court of Justiciary must determine any devolution issue ***referred*** to it by a lower court, but retains a discretion whether or not to refer devolution issues to the Supreme Court if they arose in the High Court of Justiciary itself.[14] More simply than the provisions regarding the Inner House, any determination of a devolution issue by the High Court of Justiciary (whether the devolution issue was referred to, or arose in, the High Court of Justiciary) is subject to an appeal to the Supreme Court—only with permission of the High Court, or, failing that, permission of the Supreme Court.[15]

[10] Scotland Act 1998 s 98 Sch 6 para 10.
[11] Scotland Act 1998 s 98 Sch 6 para 12.
[12] Scotland Act 1998 s 98 Sch 6 para 10.
[13] Scotland Act 1998 s 98 Sch 6 para 13.
[14] Scotland Act 1998 s 98 Sch 6 para 11.
[15] Scotland Act 1998 s 98 Sch 6 para 13 (a).

The difference in treatment between the civil and the criminal side clearly flows from the difference in ordinary jurisdiction. Ordinarily there is no appeal to the Supreme Court from the High Court of Justiciary; whereas, there is a right of appeal from the Inner House to the Supreme Court.

So far we have considered the manner in which devolution issues may reach the Supreme Court by virtue of an appeal at the instance of the parties,[16] or a reference made at the instance of the court. In addition to these avenues by which devolution issues may be considered by the Supreme Court, the legislation also accords powers for the law officers to bring devolution issues to the Supreme Court for determination. With regard to devolved legislation, the law officers can make a reference to the Supreme Court to determine the competence of a Bill before the Scottish Parliament.[17] In addition to the provisions regulating legislative activity, the Scotland Act 1998 also gives the law officers broad powers to require a court to refer devolution issues arising in cases to the Supreme Court.[18]

C Case Law

[16] Though, anyone raising a devolution issue must intimate this to the Lord Advocate: Scotland Act 1998 s 98 Sch 6 para 5.
[17] Scotland Act 1998 s 33.
[18] Scotland Act 1998 Sch 6 para 33 & 34.

Having set out the statutory provisions of the Scotland Act 1998 which relate directly to the devolution issue jurisdiction of the Supreme Court, it now falls to consider the judicial interpretation of those provisions.

1 Scotland Act 1998 s 57 (2)

The most controversial aspect of devolution issue jurisdiction has been, and perhaps still is, the role of the Lord Advocate. The Lord Advocate is the primary law officer in Scotland, and is the head of the prosecution apparatus. As a result of the Scotland Act 1998, the Lord Advocate is a member of the Scottish Executive.[19] The significance of the Lord Advocate's membership of the Scottish Executive lies within the provisions of the Scotland Act 1998 s 57 (2):

A member of the Scottish Executive has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights or with Community law.[20]

This provision clearly envisaged that the Lord Advocate's actions should, to some extent, be the subject of a human rights oversight, especially given the specific derogation accorded to the Lord Advocate under section 57 (3). It is the extent to which the Lord Advocate's actions were to be subjected to such oversight that has proven controversial. More particularly, the manner in which the Lord Advocate's

[19] Scotland Act 1998 s 44 (1) (c).
[20] The provision is tempered to some extent by Scotland Act 1998 s 57 (3).

powers are restricted by section 57 (2) has been fastened upon as a means by which broader aspects of Scottish criminal law and procedure may be reviewed. In turn, this broad brush interpretation of the Lord Advocate's powers has contributed to the growth of Scottish criminal law business in the Judicial Committee of the Privy Council. And it is the broad effects which attach to the supervision of the Lord Advocate's role that have caused calls for an amendment to the Scotland Act 1998 which would remove the Lord Advocate from the effect of section 57 (2).[21]

The concerns of elements of the Scottish judiciary, with the current operation of section 57 (2), became clear when they unilaterally submitted a document to the Calman Commission asking it to review the operation of section 57 (2).[22] In the document the judges observed that the Judicial Committee of the Privy Council had a different focus, which was causing two different approaches to Scottish criminal law.[23] However, the judges felt unable to make a common recommendation, though they provided an indication of some alternative solutions. The Calman Commission also felt unable to make a recommendation with regard to section 57 (2) for two reasons. Firstly, although the jurisdiction of the Judicial Committee did come within its remit, being connected with the Scotland Act 1998, the Commission decided that it was enmeshed with broader questions beyond its immediate purview: 'The underlying question is whether, and if so to what extent, Scottish criminal law and procedure

[21] Lord Bonomy *Improving Practice: 2002 Review of the Practices and Procedures of the High Court of Justiciary* (http://www.scotland.gov.uk/Publications/2002/12/15847/14122.) [17.1]-[17.14].
[22] http://www.commissiononscottishdevolution.org.uk/uploads/2008-10-20-judiciary-in-the-court-of-session.pdf.
[23] http://www.commissiononscottishdevolution.org.uk/uploads/2008-10-20-judiciary-in-the-court-of-session.pdf [5]-[13]. The problem of the Privy Council representing an alternative 'apex' court was also the experience of Australia before it removed appeals to the Privy Council: T Blackshield M Coper and J Goldring 'Judicial Committee of the Privy Council' in T Blackshield M Coper and G Williams (eds) *The Oxford Companion to the High Court of Australia* (Oxford University Press 2001) 560.

should in future be subject to review by the Supreme Court of the United Kingdom.'[24] Secondly, the role of the devolved office of Lord Advocate, more particularly her role as prosecutor in Scotland, was strictly not a matter within its remit.[25]

The Scottish Judiciary and the Calman Commission were moved to action by the development of section 57 (2) by the courts. In their early interpretations of section 57 (2) the Scottish judiciary themselves were extremely generous in the way in which they interpreted 'devolution issues'. These early and expansive[26] interpretations of 'devolution issues' were further broadened in such a way that the Lord Advocate, and her subordinates, were found to be in breach of section 57 (2) if they brought prosecutions in a court which itself had rules or procedures which rendered the act of bringing a prosecution contrary to section 57 (2).[27] In this way substantive aspects of Scottish criminal law effectively became subject to review by the Privy Council/Supreme Court.

The development of the broad 'devolution issue' jurisprudence by the Judicial Committee of the Privy Council meant that, when coupled with the difficulty of having a dual apex court regime, and a dual human rights regime represented by the Scotland Act 1998 and the Human Rights Act 1998, the scene was set for conflict. In

[24] Commission on Scottish Devolution *Serving Scotland Better: Scotland and the United Kingdom in the 21st Century* (Final Report 2009) [5.36]-[5.37].
[25] Commission on Scottish Devolution *Serving Scotland Better: Scotland and the United Kingdom in the 21st Century* (Final Report 2009) [5.37].
[26] In the very early days of the jurisdiction a more narrow approach was floated in *Montgomery v HMA* 2001 SC (PC) 1 by the English members of the Board, but that narrower approach was overtaken by events. See TH Jones 'Splendid Isolation: Scottish Criminal Law, the Privy Council and the Supreme Court' 2004 Crim LR 96, 102-103.
[27] *R v HMA* 2003 SC (PC) 21, 2003 SLT 4, [2004] 1 AC 462; *Brown v Stott* 2001 SC (PC) 43, 2001 SLT 59, [2003] 1 AC 681; *Montgomery v HMA* 2001 SC (PC) 1, 2001 SLT 37, [2003] 1 AC 641.

a series of important cases the potential for conflict became manifest. The House of Lords and the Privy Council reached differing conclusions upon the same point, and in such a way that exposed divergent approaches by the Scottish and English judges in each case. Furthermore, in another recent case the House of Lords affirmed that the provisions of the Scotland Act 1998 and Human Rights Act 1998 offered a duality of implementation in Scotland,[28] and that cases brought under the Scotland Act 1998 were not subject to the time bar provisions of the Human Rights Act 1998. The latter decision has proven politically emotive, and has recently been the subject of legislative activity by the Westminster government. It is to these cases which we now turn.

In *R v HMA*[29] the appellant R was charged on indictment with six counts of indecent behaviour towards children. The appellant lodged a plea in bar of trial with respect to three of charges. The ground of that minute was that the prosecution had unreasonably delayed bring the charges. The original minute proceeded on the basis of the Human Rights Act 1998 and article 6 of the ECHR; however, on appeal the minute was amended to take account of section 57 (2) of the Scotland Act 1998. The Board split on certain aspects of the decision, though not on all the aspects of the appeal. Thus, the Board unanimously held that the word 'act' in section 57 (2) was to be accorded a wide meaning, and could potentially apply to any and all acts of the Lord Advocate as prosecutor. Likewise, the Board was unanimous in its assertion that it was not open to appellants relying on Convention rights to pick and choose between relying on the

[28] *Somerville v Scottish Ministers* 2008 SC (HL) 45.The complexity of the relationship between the two Acts had been stressed in the earlier cases. See e.g.: 'The precise relationship between the remedies available under the Scotland Act 1998 and those which are available under the Human Rights Act 1998 is still in the course of being worked out' *R v HMA* 2003 SC (PC) 21 [21] (Lord Hope).
[29] *R v HMA* 2003 SC (PC) 21.

Human Rights Act 1998 and the Scotland Act 1998—they had to rely upon the terms of the Scotland Act 1998. The matter upon which the Board split, along Scottish and non-Scottish lines, was the action which was to be taken if a breach of article 6 (1) had occurred. The Scottish members of the Board, representing the majority, were of the opinion that the consequence of such a breach was that by virtue of section 57 (2) the Lord Advocate must halt any further proceedings. There was no discretion for the court with regard to remedies such as were provided in section 8 of the Human Rights Act 1998—once the breach had occurred merely bringing proceedings would not rectify matters.

The English members of the Board disagreed with this analysis of the consequences of a breach of article 6 (1). They approached the matter from the perspective of discerning the overall impact of the breach upon the appellant's right to a fair trial. In other words, the mere finding of a breach of article 6 (1) on the basis of an unreasonable delay did not automatically mean that the right to a fair trial had been lost completely. On this approach the finding of such a breach did not mean that section 57 (2) automatically required a stay of the prosecution. The differences in approach between the English and Scottish judges have, unsurprisingly, attracted academic comment.[30] Yet, it was not only the academy which noticed the dispute within the case—the House of Lords was considering a similar case in England, and the expansion of the panel to nine Law Lords to hear the case strongly suggested dissatisfaction with the result in *R v HMA*.

[30] C Himsworth 'Jurisdictional Divergences over the Reasonable Time Guarantee in Criminal Trials' (2004) 8 Edin LR 255; J Jackson and J Johnstone 'The Reasonable Time Requirement: an Independent and Meaningful Right?' 2005 Crim LR 3.

The dissatisfaction with the decision in *R v HMA* moved from perception to concrete form with the decision in *Re Attorney General's Reference (No. 2 of 2001)*.[31] A prison disturbance had occurred in an English prison in April 1998, which resulted in police investigations in June and July 1998. The police submitted their findings to the Crown Prosecution Service in July 1998. The accused prisoners were indicted in June 2000, whereupon one of the defendants successfully obtained a stay of proceedings on the basis that the delay in bringing the trial constituted a breach of article 6. The Attorney-General referred the question to the court whether a stay of proceedings could be ordered if the accused cannot demonstrate prejudice flowing from the delay, and additionally, at what point did the relevant period begin. The House of Lords held that it was not appropriate to stay proceedings in such a situation, and that lesser remedies should be utilised in the interests of public faith in the criminal justice system. Furthermore, such a breach was committed by the accrual of time before moving to prosecute, and the act of prosecuting was not itself a breach of article 6.[32] However, the decision of the House was not unanimous, and it was the Scottish Law Lords who dissented. They dissented on the basis that the appropriate remedy should be to stay proceedings, and Lord Hope made the observation that the majority approach '...empties the reasonable time guarantee almost entirely of content...'.[33]

[31] *Re Attorney General's Reference (No. 2 of 2001)* [2003] UKHL 68, [2004] 2 AC 72, [2004] 2 WLR 1, [2004] 1 All ER 1049.
[32] Drawing upon a vein of authority starting with *Martin v Tauranga District Council* [1995] 2 NZLR 419, 432 (Hardie Boys J); *Dyer v Watson* [2004] 1 AC 379 (PC).
[33] *Re Attorney General's Reference (No. 2 of 2001)* [2003] UKHL 68, [2004] 2 AC 72 (HL) 95B-C.

Of course, the decision in the *Attorney-General's Reference (No. 2 of 2001)* did not represent a technical overruling of the decision in *R v HMA*,[34] though the majority decision of the House of Lords made clear that they considered *R v HMA* to be wrongly decided.[35] In turn, this meant that the status of *R v HMA* was cast into some doubt, especially given some of the far-reaching language used in the speeches of the majority.[36] Yet the Scottish judges in the minority observed that the decision would have no formal effect in Scottish criminal law, and that the decision meant that there was a difference of approach in the two jurisdictions.[37] Such a difference of approach was likely to remain difficult, and Lord Rodger observed with prescience:

Having set out my reasons for taking a different view, I acknowledge, of course, that the view of the majority of your Lordships now settles the question in the law of England and Wales. As is obvious, the reasoning behind that decision is inconsistent with the reasoning of the majority on the equivalent point in *HM Advocate v R* [2004] 1 AC 462. While that is unfortunate, it causes no problems for the courts in England and Wales. In Scotland the decision has no formal effect on the position in criminal cases but its impact will undoubtedly be felt there. If the point is reopened before the Scottish courts in the context of a devolution issue, the Privy Council will doubtless

[34] 'While, therefore, the House may not overrule that decision of the Privy Council, I should make clear my preference for the opinion there expressed by the dissenting minority, which I take to be consistent with my opinions in the present case.' *Re Attorney General's Reference (No. 2 of 2001)* [2003] UKHL 68, [2004] 2 AC 72 (HL) 92D (Lord Bingham), 110H (Lord Hope). See also Scotland Act 1998 s 103 (1) 'Any decision of the Judicial Committee in proceedings under this Act shall be stated in open court and shall be binding in all legal proceedings (other than proceedings before the Committee).

[35] *Re Attorney General's Reference (No. 2 of 2001)* [2003] UKHL 68, [2004] 2 AC 72 (HL) 94D-E (Lord Nicholls), 118C-D (Lord Hobhouse).

[36] 'It follows that it is not unlawful (in England) or ultra vires (in Scotland) to proceed to trial despite the unreasonable delay.' *Re Attorney General's Reference (No. 2 of 2001)* [2003] UKHL 68, [2004] 2 AC 72 (HL) 120C-D (Lord Hobhouse).

[37] *Re Attorney General's Reference (No. 2 of 2001)* [2003] UKHL 68, [2004] 2 AC 72 (HL) 112E-G (Lord Hope), 133E-F (Lord Rodger).

be called upon to determine it. At this stage I do not consider that it would be helpful to say more.[38]

The jurisdictional gap that had opened up was clearly problematic, and has been described as '...constitutionally improper.'[39] Further, it is clear from Lord Rodger's observations set out above that it seemed that it would not be long before the issue would be revisited by the Judicial Committee of the Privy Council. This duly occurred in *Spiers v Ruddy*,[40] where the divergent approaches taken by the House of Lords and the Privy Council were reconciled. The accused had been convicted of driving whilst disqualified, and in 1999 a temporary sheriff had ordered him to be disqualified from driving for three years. In March 2002 the accused lodged a bill of suspension to challenge his disqualification on the basis that the ban was imposed by a temporary sheriff. Later in May 2002 the accused was again arrested for driving whilst disqualified and for giving a false name. The accused then entered a plea to the competency of the charge on the ground that the original disqualification had been imposed by a temporary sheriff. The sheriff felt bound to await the ruling on the bill of suspension, which the High Court of Justiciary duly refused in early 2005. In early 2006 the accused raised a devolution issue stating that his article 6 right to trial within a reasonable time had been breached, and therefore, the Lord Advocate could not proceed.

[38] *Re Attorney General's Reference (No. 2 of 2001)* [2003] UKHL 68, [2004] 2 AC 72 (HL) 133 [179].
[39] T Kelly 'Bringing Remedies Home: Scotland Act 1998' 2009 SLT (News) 87, 88.
[40] *Spiers (Procurator Fiscal) v Ruddy* [2007] UKPC D2, 2009 SC (PC) 1, [2008] 1 AC 873. The Appeal Cases report is more useful as it contains an account of the verbal pleadings, and indeed judicial intervention during the pleadings.

The Lord Advocate required the sheriff to make a reference to the Judicial Committee[41] so that the Committee might determine if there had been an unreasonable delay, and if the Lord Advocate could still proceed even if there had been a breach on the premise that a fair trial remained possible. It is readily apparent that the Lord Advocate's reference was raised to give the Privy Council an opportunity to revisit substantially the same questions as had been considered in *Attorney-General's Reference (No. 2 of 2001)*. The Privy Council took the opportunity to depart from *R v HMA*, and to follow *Attorney-General's Reference (No 2. of 2001).*

The Crown suggested[42] that *R v HMA* should be reconsidered as wrong, and that it was fundamentally opposed to the decision in *Attorney-General's Reference*.[43] Further, although incompatible, the direct question of relative authority of the decisions need not be addressed as they had been overtaken by subsequent decisions of the European Court of Human Rights, which were said to be against *R v HMA*.[44] The Crown closed with the point that it '...merely desire[d] that some flexibility be restored to the system in Scotland. If undue delay can be put right, further delay prevented and/or compensation paid at the end there is no need to abandon proceedings in the middle.'[45]

[41] Scotland Act 1998 Sch 6 para 33.
[42] The Advocate General had intervened, and adopted the Crown submissions.
[43] *Spiers v Ruddy* [2008] 1 AC 873 (PC) 874H.
[44] *Spiers v Ruddy* [2008] 1 AC 873 (PC) 875A-B.
[45] *Spiers v Ruddy* [2008] 1 AC 873 (PC) 875D.

The reply on behalf of the defendant was that the new European cases were not in point, and that *R v HMA* represented a good pragmatic approach whereby remedies for breach as a matter of domestic law were properly implemented. The way in which the judicial wind was blowing can be gleaned from the intervention made by Lord Bingham, who had presided in *Attorney-General's Reference (No. 2 of 2001)*, during the course of the arguments: 'Having looked at the new European authorities the Board would take a lot of persuading to depart from the decision of the House in *Attorney General's Reference (No. 2 of 2001)...*'.[46]

Unsurprisingly, Lord Bingham did not change his mind when he gave his judgment. The key issue was the reconciliation of the two contradictory approaches of the House of Lords and the Judicial Committee. The reconciliation was effected by finding that the Strasbourg jurisprudence had developed since these two cases, and that it had followed a course closer to that set out in *Attorney-General's Reference (Ref No. 2 of 2001)*.[47] This being the case, it became clear that the approach as governed by section 57 (2) in Scotland should be the same as that taken in the House of Lords.[48] The Board was thus unanimous in finding that the Lord Advocate could bring a prosecution—by expediting the prosecution the Lord Advocate could take herself out of being in breach of article 6, and in that way section 57 (2) was not therefore in

[46] *Spiers v Ruddy* [2008] 1 AC 873 (PC) 875C.
[47] The *Attorney-General's Reference* was the subject of criticism at the time on the basis that it represented an example of the English judiciary's ambivalence towards the significance they attach to Convention rights: P Metcalfe and A Ashworth 'Delay in Criminal Proceedings: Unreasonable Delay' 2004 Crim LR 574, 576.
[48] *Spiers v Ruddy* [2008] 1 AC 873 (PC) 880D-E (Lord Bingham).

play.[49] It is worth noting however, that the consequences of a breach of section 57 (2) remain final and irremediable—operating like an 'axe'—because of a lack of vires.[50]

In *Spiers v Ruddy* the divergent approaches of the House of Lords and the Judicial Committee of the Privy Council were resolved with reference to Strasbourg jurisprudence. Yet the potential for a duality of approach had been clearly demonstrated. It is another matter whether such a difference in approach is necessarily to be viewed negatively, raising the question whether a margin of appreciation can exist within a single sovereign state of different legal systems. In the event, the approaches were reconciled, and the assumption by the Supreme Court of the 'devolution issue' jurisdiction may prevent future difficulties regarding dual authorities of binding effect.[51] On the other hand, if one takes the view that such distinctiveness is desirable, as a justifiably legitimate separate Scottish approach, then the assumption of a common jurisdiction seems less favourable.

In *Somerville v Scottish Ministers*[52] the interaction between the Scotland Act 1998 and the Human Rights Act 1998 was revisited, as indeed was the effect of section 57 (2) of the Scotland Act 1998, though this time it did not involve the Lord Advocate. The facts of the case were that certain prisoners sought judicial review of the decision of a prison governor to segregate them from other prisoners. The questions of law with which the House had to grapple were intricate. For present purposes we are concerned

[49] *Spiers v Ruddy* [2008] 1 AC 873 (PC) 882H.
[50] *Spiers v Ruddy* [2008] 1 AC 873 (PC) 881C-D (Lord Hope).
[51] Though the point is not free from doubt due to the language used in Constitutional Reform Act 2005 s 41 (3).
[52] *Somerville v Scottish Ministers* 2008 SC (HL) 45.

with the interaction of the Human Rights Act 1998 and Scotland Act 1998. The first question was whether a claim for damages based upon the breach of a Convention right by a member of the Scottish Executive was the subject of section 7 (5) of the Human Rights Act 1998.[53] If the time bar contained within section 7 (5) of the HRA was applicable, how was that period computed? Further, was the prison governor to be held a member of the Scottish Executive for the purposes of section 57 (2) of the Scotland Act 1998?

The key issue was the manner in which section 7 (5) might have been applicable. More particularly, while section 7 (5) made the regime of the Human Rights Act 1998 subject to a one year cut off period, the Scotland Act 1998 contained no such provision—there was no time limit.[54] This meant that the legal character of the prison governor became crucial—it was common ground that he represented a public authority for the purposes of section 6 (1) of the HRA; however, liability under that section would be subject to the one year limitation imposed by section 7 (5) of the HRA. If however, the prison governor could be said to be a member of the Scottish Executive, and the breach of the convention rights were dealt with through section 57 (2) of the Scotland Act 1998, then no such time limit would be extant. The broad tension which underlay these considerations was crisply summarised by Lord Hope:

Anybody who wishes to bring any proceedings against a member of the Scottish Executive on the ground that an act or a failure to act is incompatible with the

[53] Human Rights Act 1998 s 7 (5) stipulates that proceedings brought under the Act must be brought before the end of the period of one year beginning with the date on which the act complained of took place.
[54] *Somerville v Scottish Ministers* 2008 SC (HL) 45 [3] (Lord Hope).

Convention rights, or to rely on any of the Convention rights in any proceedings, needs to know whether he must do this under secs 6 to 8 HRA or whether he must do so, or can do also, on the ground that the act or failure to act is contrary to the provisions of the Scotland Act...Reduced to its simplest terms, the question is whether both Acts apply where a remedy is sought on the ground of incompatibility with the Convention rights with regard to an act or a failure to act of a member of the Scottish Executive that is said to be outside devolved competence; or whether only one or the other Act applies and, if so, which of them.[55]

The decision in *Somerville* made clear that an individual in Scotland would, in many circumstances, have a choice between raising an action under the provisions of the Scotland Act 1998 or the Human Rights Act 1998. While such a judicial interpretation of the statutes may have been unexpected, the political response to the decision was perhaps less surprising. The realisation that the decision potentially allowed litigants to bring actions against the Scottish Government without a time bar caused a strong reaction. The political discontent was compounded by the spectre of claims for "slopping out,"[56] which would allow prisoners, never a popular class of litigant in government circles, to bring actions under the Scotland Act 1998 without a time bar.[57] The estimated cost to the Scottish Government of meeting slopping out claims had

[55] *Somerville v Scottish Ministers* 2008 SC (HL) 45 [10]-[11].
[56] *Napier v Scottish Ministers* 2005 1 SC 229. On the development of slopping out in Scots law: A Lawson and A Mukherjee 'Slopping out in Scotland: the Limits of Degradation and Respect' (2004) 6 EHRLR 645; S Foster 'Prison Conditions, Human Rights and Article 3 ECHR' 2005 PL 35;
[57] C Himsworth 'Conflicting Interpretations of a Relationship: Damages for Human Rights Breaches' (2008) 12 Edin LR 321, 321; T Murphy and N Whitty 'Risk and Human Rights in UK Prison Governance' (2007) 47 Brit J Criminology 798

been put at between £45m[58] to £80m. The political dissatisfaction with such a regime culminated[59] with the speedy passing of legislation to impose a time bar.[60]

The most recent decisions of the Privy Council demonstrate that the devolution issue jurisdiction remains at an early definitional stage. In *McDonald v HMA*[61] the Board was dealing with a case concerning the Crown's duty to disclose evidential materials as a necessary ingredient for an accused to receive a fair trial for the purposes of article 6 of the ECHR.[62] In the event the Board dismissed the appeals on the basis that the Crown had met its obligations. Perhaps of more general significance were three points made during the decision: first, it was re-iterated by Lord Rodger, that even if the Crown was in breach of article 6, it does not necessarily follow that there has been a miscarriage of justice;[63] secondly, the Board expressly declined the Advocate General's invitation to define clearly how a system of disclosure might work on the basis that the Solicitor General and Scottish Ministers were currently addressing the issue;[64] and thirdly, the Board clearly stated that a decision of the High Court of Justiciary to designate an issue as a devolution issue or otherwise did not bar the

[58] Auditor General for Scotland Report SE/2005/142 [5].
[59] The process was a complicated one. An Order in Council was required under s 30 of the Scotland Act 1998 to give the Scottish Parliament legislative competence with respect to this issue: Scotland Act 1998 (Modification of Schedule 4) Order 2009 (SI 2009/1380 (S8)).
[60] Convention Rights Proceedings (Amendment) (Scotland) Act 2009 asp 11.
[61] *McDonald v HMA* [2008] UKPC 46, 2008 SLT 993.
[62] The duty of disclosure had been dynamically altered before convention Rights were adopted into Scots law: *McLeod v HMA (No 2)* 1998 JC 67, 1998 SLT 233; *Maan v HMA* 2001 SLT 408. The adoption of Convention rights through the Scotland Act 1998 meant that further scrutiny was brought to bear upon the need for the Crown to disclose evidential material: *Holland v HMA* 2005 1 SC (PC) 3, 2005 SLT 563; *Sinclair v HMA* [2005] UKPC D2, 2005 1 SC (PC) 28, 2005 SLT 553.
[63] *McDonald v HMA* [2008] UKPC 46 [77].
[64] *McDonald v HMA* [2008] UKPC 46 [36] (Lord Hope). An independent report on the matter had been carried out by Lord Coulsfield: Lord Coulsfield *Review of the Law and Practice of Disclosure in Criminal Proceedings in Scotland* (2007) (available at: http://www.scotland.gov.uk/Publications/2007/09/11092728/0). The recommendations were put out for consultation, and on the 5th March 2009 the Justice Secretary laid an Executive Bill before the Scottish Parliament to regulate disclosure in the future: Criminal Justice and Licensing (Scotland) Bill (SP Bill 24).

jurisdiction of the Privy Council.[65] There is a suggestion that the High Court may have been attempting to define away the ability of the Privy Council to review their decision,[66] but it was clearly held that if a devolution issue is substantially engaged then any decision of the High Court, in whatever terms it made that decision, would represent a 'determination' for the purposes of allowing the Privy Council jurisdiction.[67] It has, however, recently been held that this does not relieve the accused from the need to formulate a devolution issue in such a way as to give the statutorily required notice to persons nominated in the Scotland Act 1998.[68]

The importance of substance over form was again illustrated by the Privy Council in *Burns v HMA*,[69] a decision dealing with reasonable time imperatives under article 6.[70] In *Burns* the accused was being charged in relation to indecent images of children, in an operation which involved substantial cooperation between police forces in England and Scotland. The accused was arrested by English police officers on 18th February 2003; however, it was subsequently decided that the appropriate *locus* for prosecution was Scotland, and so in December 2004 was issued with a petition warrant in Scotland. The contention of the accused was that he had been charged for the purposes of article 6 in February 2003 when arrested by English police; whereas the Crown argued that the computation of time should run from December 2004 on the basis that English police officers were not a competent authority in Scottish law

[65] *McDonald v HMA* [2008] UKPC 46 [16] (Lord Hope); [49] (Lord Rodger).
[66] See also *C v Miller* 2004 SC 318 (IH), where the term 'determination' was confined to decisions on the merits; this decision was doubted in *McDonald v HMA* [2008] UKPC 46.
[67] See Scotland Act 1998 Sch 6 para 1 (d) & (e).
[68] *Allison v HMA* [2009] HCJAC 27. See Scotland Act 1998 Sch 6 para 5.
[69] *Burns v HMA* [2008] UKPC 63, 2009 SLT 2.
[70] The case is also notable insofar as Lady Cosgrove sat as only the second judge in a devolution issue who was not, nor or had been, a Lord of Appeal in Ordinary.

within the meaning set down in *Eckle v Federal Republic of Germany*.[71] The contentions of the Crown had been accepted by the High Court, who observed that English police officers were no more amenable to direction from the procurator fiscal than were police of Greece or Bulgaria.[72]

The Privy Council rejected such a view as unduly artificial, in particular emphasising the fact that the distinctions between the criminal jurisdictions within the United Kingdom must be '...seen in their real, practical, context within the United Kingdom.'[73] Therefore, the fact that the United Kingdom was a signatory to the ECHR meant that in considering the accused's rights under article 6 the Board should '...look at the sum total of the actions of the competent English and Scottish authorities.'[74] However, Lord Rodger also reiterated that, after *Spiers v Ruddy*,[75] unreasonable delay was not a necessary bar to the Crown proceeding to trial.[76]

2 Challenges to Legislative Competence

Although the majority of decisions in the Privy Council have related to section 57 (2) of the Scotland Act 1998, not all of them have. In addition to the section 57 (2) cases there have also been a few cases considering a novel idea for traditional British constitutional law—a court undertaking substantive review of the *vires* of an elected

[71] *Eckle v Federal Republic of Germany* (1982) 5 EHRR 1.
[72] *Burns v HMA* [2007] HCJAC 66 [11] (Opinion of the Court).
[73] *Burns v HMA* [2008] UKPC 63 [18] (Lord Rodger).
[74] *Burns v HMA* [2008] UKPC 63 [27] (Lord Rodger).
[75] *Spiers v Ruddy* [2007] UKPC D2.
[76] *Burns v HMA* [2008] UKPC 63 [28] (Lord Rodger).

parliament[77] and its legislation.[78] In *Anderson v The Scottish Ministers*[79] the first Act passed by the Scottish Parliament, the Mental Health (Public Safety and Appeals) (Scotland) Act 1999 was the subject of challenge. The challenge to the validity of the Act rested upon section 29 (2) (d) which, read alongside section 29 (1), provides that an Act of the Scottish Parliament which is contrary to Convention rights is not law. The appellants argued that the statute represented a violation of article 5 (1) (e) of the ECHR because the mental illness was incapable of treatment—this argument was rejected by the Board.[80] The Board pointed out that there was no suggestion in article 5, nor the Strasbourg jurisprudence on the matter, which suggested that the mental illness had to be treatable. Accordingly, the first challenge to the competence of the Scottish Parliament, and indeed the validity of one of its Acts, failed.

Subsequent reported challenges to the validity of an Act of the Scottish Parliament have suffered the same fate in the Privy Council. In *Flynn v HMA (No 1)*[81] the Convention Rights (Compliance) (Scotland) Act 2001 was the subject of review insofar as it affected prisoners serving life sentences for murder. The legislation altered the manner in which prisoners serving life sentences had their cases managed subsequently; more particularly, in some cases the result of the legislation was to increase the time period before a prisoner would have his case considered by the Parole Board. The Board held that the legislation was within the competence of the

[77] See *DS v HMA* [2007] UKPC 36 [89] (Lady Hale).
[78] See Scotland Act 1998 Sch 6 Part I Para 1 (a) which defines as a devolution issue a question whether an Act is within the legislative competence of the Scottish Parliament.
[79] *Anderson v The Scottish Ministers* [2001] UKPC D5; 2002 SC (PC) 63.
[80] *Anderson v The Scottish Ministers* [2001] UKPC D5 [28] (Lord Hope) & [59] (Lord Clyde).
[81] *Flynn v HMA* [2004] UKPC D1; 2004 SC (PC) 1; 2004 SLT 863.

Scottish Parliament, and indeed was specifically drafted to ensure Convention compliance.[82]

In *DS v HMA*,[83] the most recent challenge to legislation of the Scottish Parliament to have been addressed by the Privy Council, the court was asked to review the lawfulness of the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002, which amended the Criminal Procedure (Scotland) Act 1995. The effect of the amendment was to alter the manner in which evidence pertaining to the character of a complainer, and the disclosure of previous convictions, were handled in cases involving sexual offences. Specifically in *DS v HMA* the complainer's case rested upon the assertion that his art 6 rights were breached by the amendment since it exerted undue pressure on him not to ask certain questions on pain of having previous convictions disclosed.[84] The Board declined to strike down the legislation as ultra vires. In the course of arriving at this conclusion Lord Hope stated that the competence issue could be broken down into three questions, which were similar to those set out in *Flynn*.[85] This may suggest the development of the following sequence of inquiry: 1) what does the relevant provision mean when read in conjunction with other provisions with which it interacts?; 2) how is the relevant provision intended to operate in practice?; 3) is the relevant provision, on that reading and given that method of operation, compatible with an individual's convention rights,[86] and thus within the competence of the Scottish Parliament? It may be that this will become the settled approach to competence questions, though there have been so few that such a

[82] *Flynn v HMA* [2004] UKPC D1 [95] (Lady Hale).
[83] *DS v HMA* [2007] UKPC 36; 2007 SC (PC) 1; 2007 SLT (PC) 1026
[84] *DS v HMA* [2007] UKPC 36 [15] (Lord Hope).
[85] *DS v HMA* [2007] UKPC 36 [18] (Lord Hope).
[86] The definition of Convention rights is set out clearly by Lady Hale as being the definition expounded by the court in Strasbourg: *DS v HMA* [2007] UKPC 36 [89]-[96] (Lady Hale).

suggestion remains speculative. Yet, challenges to the validity of an Act of the Scottish Parliament are not confined to the Privy Council. There is currently an ongoing judicial review of an Act of the Scottish Parliament, whereby the Scottish Parliament's legislative response to a decision of the House of Lords,[87] relating to 'pleural plaques,'[88] has been the subject of challenge on the basis of judicial review.[89]

What is clear is that to date there have been no successful challenges to the validity of an Act of the Scottish Parliament.

[87] *Rothwell v Chemical & Insulating Co Limited* [2008] 1 AC 281 (HL).
[88] The Damages (Asbestos Related Conditions) (Scotland) Act 2009.
[89] *Axa General Insurance Ltd Petrs* [2009] CSOH 57. See also *McKenzie v Carillion (Singapore) Ltd* [2009] CSOH 100A.

Appendix III: Autonomy of Scottish law within the appellate jurisdiction of the House of Lords/Supreme Court

A Introduction

The Scotland Act 1998 is but the latest chapter in the constitutional narrative of Scots law and the Scottish legal system. The running theme of that narrative has been the separateness of the Scottish system from those of England and Wales and of Northern Ireland. Yet separateness has never been complete, autonomy never more than 'relative'. The several legal systems of the single 300 hundred year old polity of the United Kingdom have had many and cumulative occasions for interpenetration. This organic development has been both influenced by and reflected in the manner in which the House of Lords has exercised its function as an appellate court.

Although the House of Lords consistently rejected purported appeals from decisions of the High Court of Justiciary, it did accept appeals from the Court of Session shortly after the Union of 1707.[1] Accordingly, the nature of appeals which could relevantly be brought to the House of Lords was well settled early in the history of the new state. What was less clear, and perhaps more surprising for its lack of clarity, was the institutional quality or corporate character of the House of Lords as a court. Further, the vagueness and ambiguity at the general institutional level left unresolved certain questions relating to precedent at a more

[1] See Appendix I.

practical level. In what follows, we will first explore this background of vagueness and ambiguity in terms of the Appeal Committee of the House of Lords, before going on to consider the extent to which the creation of the new Supreme Court changes the position.

B House of Lords

The Appeal Committee of the House of Lords represented the highest court in civil matters for Scotland for three centuries. What is remarkable, therefore, is the extent to which the theoretical character in which this highest tribunal operated has been, and indeed remains, underspecified.[2] This has been well described by a number of commentators:

> Before considering the ways in which decisions of the House of Lords affect current practice of precedent in Scotland, something must first be said about the identity of the House as a court. Given the House's role in constitutional and general legal matters, it is surprising perhaps to discover that it is not altogether clear in what capacity the House sits as a court, and in particular whether the House is to be characterised as a Scottish court or alternatively as a United Kingdom court.[3]

[2] See E Attwool *The Tapestry of the Law: Scotland, Legal Culture and Legal Theory* (Kluwer 1997) 69.
[3] G Maher and TB Smith 'Judicial Precedent' in TB Smith (ed) *The Laws of Scotland: Stair Memorial Encyclopaedia* (The Law Society of Scotland Butterworths Edinburgh 1987) Vol 22 [270]. See also TB Smith *The Doctrines of Judicial Precedent in Scots Law* (W Green & Son Edinburgh 1952) 48; and at p 53 where Smith suggests that 'Much could be said in favour of the Judicial Committee of the House of Lords hearing Scottish appeals in Edinburgh.'

The difficulty in characterising the nature of the House of Lords as a court of law is a result of the organic development of its jurisdiction, and the asymmetry of the different systems which it served. On the one hand, it was the final court of appeal for the legal systems of England and Wales, Northern Ireland, and Scotland in civil matters. On the other hand, these different legal systems or jurisdictions have their own substantive laws and procedures, though the extent of the differences between the three systems is variable. Yet, while the different systems are distinct and have their own structural integrity, there is also a somewhat amorphous body of law which may be common to the different systems—sometimes said to be areas of general jurisprudence, statutory construction, and perhaps now more broadly with regard to non-devolved matters under the Scotland Act.

These different aspects of the interactions between the different systems within the House of Lords have traditionally been considered within the context of the system of precedent.[4] As the House of Lords appears not to have conclusively specified its own character, the key judicial conceptualisations of the nature of the House of Lords hearing Scottish appeals are pronouncements of the Court of Session. In *Virtue v Commissioners of Police of Alloa*[5] a seven judge bench arrived at a variety of different views with regard to the nature of the judicial character of the House of Lords. The most strident views expressed in favour of the House of Lords as a United Kingdom court are those of Lord President Inglis:

> I think it is an error in constitutional law to represent the House of Lords as sitting at one time as a Scottish Court and at another time as English Court. That House,

[4] G Maher and TB Smith 'Judicial Precedent' in TB Smith (ed) *The Laws of Scotland: Stair Memorial Encyclopaedia* (The Law Society of Scotland Butterworths Edinburgh 1987) Vol 22 [270].
[5] *Virtue v Commissioners of Police of Alloa* (1874) 1 R 285 (IH).

> I apprehend, sits always in one character, as the House of Lords of the United Kingdom, and as such the Imperial Court of Appeal for the whole three parts of the United Kingdom. It has occasion to administer at one time the law of Scotland, at another the law of England and at another the law of Ireland. But in appeals coming from all three countries it has to deal with principles of law that are common to the whole three.[6]

This pronouncement is the clearest authority in favour of viewing the House of Lords as a United Kingdom court,[7] though it is a different matter to ascertain the law which that court administered.

Against the above view, it has been suggested elsewhere that the House of Lords not only applied Scots law, but, furthermore, that when hearing a Scottish appeal it sat as a specifically Scottish court.[8] It seems clear at least, then, that the law which was administered by the court, whether it was a United Kingdom or Scottish court, is Scottish law. Yet, within this statement there are hidden complications and unresolved questions—namely, to what extent is such 'Scottish law' permeated by notions of 'general jurisprudence', and what status and significance should be accorded to statutory interpretations of United Kingdom statutes. Furthermore, these questions are closely tied up with the issue of the precedent value of decisions of the House of Lords, when dealing with appeals from the other legal systems of the United Kingdom.

[6] *Virtue v Commissioners of Police of Alloa* (1874) 1 R 285 (IH) 296.
[7] See also TB Smith *The Doctrines of Judicial Precedent in Scots Law* (W Green & Son Edinburgh 1952) 49.
[8] DM Walker *The Scottish Legal System* (8th edn W Green/Sweet & Maxwell Edinburgh 2001) 443.

According to one commentator writing at the beginning of the 20th century:

> The distinction thus drawn indicates three classes of decisions by the House of Lords, binding on our courts in different degrees. (1.) When the House of Lords as an Appeal Court is administering the law of Scotland, its decision is conclusively binding on Scotch Courts. (2.) When it is administering English or Irish law, its decision is not necessarily binding on our Courts… (3.) When the House of Lords is dealing with principles of law common to the three countries—such as the construction of an imperial statute—its decisions are conclusively binding.[9]

It is important to note the language used in the first rule, notably when the House is *administering the law of Scotland* it is binding. This is different from saying that only decisions on appeals *from* Scotland are binding upon the Scottish courts, which in turn opens up questions with regard to the fact that the laws of Scotland, England and Northern Ireland are institutionally comprehended through the device of judicial knowledge.[10] While it has been suggested that an appeal from another United Kingdom legal system which nonetheless results in the application of Scottish law might be binding, others have stated that:

> '…the view that these observations have only high persuasive authority for the Court of Session but are not absolutely binding seems preferable and more

[9] JH Henderson 'English Cases as Scots Authorities' (1900) 12 JR 304, 305-06.
[10] See *Elliot v Joicey* 1935 SC (HL) 57; *Bank of East Asia Ltd v Scottish Enterprise* 1997 SLT 293; *MacShannon v Rockware Glass Ltd* [1978] AC 795; *Oakley v Osiris Trustees Ltd* [2008] UKPC 2 [40] (Lord Walker).

> rational. No Scottish Lord of Appeal nor Scottish counsel might have been involved…Thus, although the House of Lords may take judicial notice of Scots law in an English appeal for the purposes of that appeal, it would jeopardise the coherence of Scots law if it were to be determined conclusively by a decision of the House of Lords, especially if it has sat without the assistance of Scottish law lords or counsel.'[11]

It appears, therefore, that the exact force accorded to a decision of the House of Lords is a matter of context and degree. It seems clear that a decision in an appeal from another legal system within the United Kingdom, which also deals with the law of that system, will be accorded great respect but cannot be said to represent a binding precedent. However, to this proposition there must be attached the following caveat—statutory interpretations of United Kingdom statutes appear to be given a stronger precedent value. Therefore, according to Henderson such a decision will be binding in a Scottish appeal.[12] This assertion is accepted without demur by TB Smith, though he is careful to point out that the binding effect accorded to a statutory interpretation is different from the more nebulous authority ascribed to decisions proceeding upon questions of 'general jurisprudence.'[13] A more tentative approach is advanced by Walker who suggests that 'Decisions of the House in English appeals on statutory provisions common to England and Scotland are probably binding, but not if the statute is peculiar to England.'[14] Even more cautiously, however, it has been suggested that:

[11] G Maher and TB Smith 'Judicial Precedent' in TB Smith (ed) *The Laws of Scotland: Stair Memorial Encyclopaedia* (The Law Society of Scotland Butterworths Edinburgh 1987) Vol 22 [272].
[12] JH Henderson 'English Cases as Scots Authorities' (1900) 12 JR 304.
[13] TB Smith *The Doctrines of Judicial Precedent in Scots Law* (W Green & Son Edinburgh 1952) 59.
[14] DM Walker *The Scottish Legal System* (W Green/Sweet & Maxwell Edinburgh 2001) 443-44.

> '...the preferable view may be that even in interpreting statutory provisions applicable to Great Britain or the United Kingdom, although it is highly probable that the House will accept an interpretation adopted in an English appeal as appropriate to be followed in a subsequent Scottish appeal (and conversely), it is not strictly bound to do so...There is probably more sensitivity to such matters than hitherto. Thus, although in *McIntyre v Armitage Shanks Ltd* the House adopted a statutory interpretation pronounced in a prior case, Lord Fraser was careful to indicate that it was not formally binding in a Scottish appeal.'[15]

Therefore, there is a full spectrum of views regarding the binding force of a decision of the House of Lords interpreting a United Kingdom statute. At one end the decision is said to be binding, whereas at the other end it is said to be *not* strictly binding, though it will be given very full consideration. The judicial pronouncements on the issue are not capable of easy reconciliation either. We have already seen the broad expressions of opinion uttered by Lord President Inglis in *Virtue v Commissioners of Police of Alloa*,[16] where he stated that the true constitutional position of the House of Lords was as a United Kingdom court. However, in a later case Lord President Inglis sought to clarify his remarks:

> I recognise without hesitation the position of the House of Lords as the Court of ultimate resort, in the fullest sense, for the whole three parts of the United Kingdom; and I had occasion in the very remarkable case of *Virtue v Commissioners of Police of Alloa*, differing from my brethren, to express myself

[15] G Maher and TB Smith 'Judicial Precedent' in TB Smith (ed) *The Laws of Scotland: Stair Memorial Encyclopaedia* (The Law Society of Scotland Butterworths Edinburgh 1987) Vol 22 [272].
[16] *Virtue v Commissioners of Police of Alloa* (1874) 1 R 285 (IH) 296.

> in the following words: "I think it an error in constitutional law, to represent the House of Lords as sitting at one time as a Scotch court, and at another time as an English court. That House, I apprehend, sits always in one character, as the House of Lords of the United Kingdom, and as such the imperial Court of Appeal for the whole three parts of the United Kingdom. It has occasion at one time to administer the law of Scotland, at another the law of England and at another the law of Ireland. But in appeals coming from all three countries, it has also to deal with principles of law that are common to the whole three." If this be sound the corollary is manifest. This Court is bound by the judgments of the House of Lords in cases of the last description as authorities, even though the judgments may have been pronounced in Scotch appeals. But it is otherwise when the House if administering a law different from or antagonistic to the principles of the law of Scotland. There the judgment on appeal is no more binding on this court than the judgment of the Court of first instance, from which the appeal comes.[17]

Accordingly, the binding effect which Lord President Inglis would ascribe to such cases is confined to this somewhat more nebulous class of matters of 'general jurisprudence'. Historically this concept of general jurisprudence has been difficult to define categorically, and indeed it seems better to view the exercise as a case by case attempt to show common rules and principles between the two systems, rather than as an appeal to an abstract general jurisprudence.[18] Indeed, the leading judgment in the House of Lords appeal of *Ewing v Orr*

[17] *Ewing v Orr Ewing* (1885) 10 App Cas 453 (HL) 480-81. See also the intervention during argument by the Earl of Selbourne who talks of the House sitting as a 'Scotch Court' at 495, before his substantive judgment on the issue at 499.

[18] The point has been pressed in the literature that defining the meaning of this general jurisprudence can be difficult: DM Walker *The Scottish Legal System* (W Green/Sweet & Maxwell Edinburgh 2001) 444. Others have noted the potential for using this conceptualisation as a vehicle for latent, or indeed overt, Anglicisation:

Ewing[19] gives less strength to a precedent arising from another United Kingdom system, even if it proceeds upon such general principles of jurisprudence:

> A decision of this House, in an English case, ought to be held conclusive in Scotland, as well as England, as to the questions of English law and English jurisdiction which it determined. It cannot, of course, conclude any question of Scottish law, or as to the jurisdiction of any Scottish Court in Scotland. So far as it may proceed upon principles of general jurisprudence, it ought to have weight in Scotland; as a similar judgment of this House on a Scotch appeal ought to have weight in England. If, however, it can be shewn that by any positive law of Scotland, or according to authorities having force of law in that country, a different view of the proper interpretation, extent, or application of those principles prevails there, the opinions on those subjects, expressed by noble and learned Lords when giving judgment on an English appeal ought not to be held conclusive in Scotland. When a Scottish decision, in apparent conflict with them, is brought to the bar of this House, the first duty of your Lordships must (I conceive) be, to ascertain, whether there is any settled rule of Scottish law, requiring or justifying that decision.[20]

It is striking that this judgment, just in order to demonstrate its high sensitivity to the position of Scots law, is prepared to be less strict in its view of the binding effect of its own decisions relating to matters proceeding upon general jurisprudence. It should, however, be borne in

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TB Smith *The Doctrines of Judicial Precedent in Scots Law* (W Green & Son Edinburgh 1952) 58, citing A Dewar Gibb *Law from Over the Border* (W Green Edinburgh 1950).

[19] *Ewing v Orr Ewing* (1885) 10 App Cas 453 (HL).

[20] *Ewing v Orr Ewing* (1885) 10 App Cas 453 (HL) 499.

mind that the context for the case was a direct conflict between the authority of Court of Session and the Court of Chancery, and the argument relating to the authority of the House of Lords was treated as something of a side issue by the majority of the law lords.

C United Kingdom Supreme Court

The question that falls to be considered now is the extent to which the newly established Supreme Court may take a different approach to the, admittedly somewhat unclear, approach previously taken by the House of Lords. It seems clear on the one hand that the House of Lords applied the law of the court system from which the appeal before came. On the other hand, although perhaps less definitively clear it seems that the House of Lords constituted a single United Kingdom court. The relative authority accorded to the decision of the House of Lords in a case from one UK jurisdiction in another remained unclear, as there was no definitive pronouncement from the House of Lords itself, and the opinions of commentators are divided.

The legislative provisions which set out the competence and remit of the newly established Supreme Court provide guidance on the matter. Technically, indeed, this will be decisive as the court is not a court of inherent jurisdiction but a creature of statute. The new Supreme Court's Scottish jurisdiction is defined in section 40 (3) of the Constitutional Reform Act 2005, which states that it will be competent to hear appeals from any Scottish court from which an appeal lay to the House of Lords at or immediately before the commencement of the section. Therefore, in order to understand the jurisdiction of the newly erected Supreme

Court it is necessary to be aware of the prior jurisdiction exercised by the House of Lords. The basic point here is that criminal appeals, except those dealing with devolution issue matters, will not be within the purview of the new Supreme Court.

In addition to the jurisdictional provisions contained within section 40, the Act then goes on to provide for the Supreme Court's 'Relation to other courts.'[21] It is this section that seeks to offer clarification of the interaction between the different legal systems of the United Kingdom within a single apex court. The first subsection states that 'Nothing in this Part is to affect the distinctions between the separate legal systems of the parts of the United Kingdom.'[22] At first blush this may seem to suggest that the distinct nature and integrity of the separate legal systems of the United Kingdom, notably those of Scotland, England and Wales, and Northern Ireland, is fully endorsed and protected. However, the provision is capable of another interpretation. The subsection literally provides only that the provisions of the new Act will not affect those distinctions between the separate legal systems that already obtain. In this sense the subsection preserves precisely the existing understanding of the separateness of those legal systems, and so cannot resolve existing doubts and ambiguities about the nature and degree of that separateness.

The section goes on to further provide that 'A decision of the Supreme Court on appeal from a court of any part of the United Kingdom, other than a decision on a devolution matter, is to be regarded as the decision of a court of that part of the United Kingdom.'[23] Accordingly, this provision is capable of being read as a rationalisation of the question of whether the court sits

[21] Constitutional Reform Act 2005 s 41.
[22] Constitutional Reform Act 2005 s 41 (1).
[23] Constitutional Reform Act 2005 s 41 (2).

as a United Kingdom court applying the law of the individual systems which it serves; or alternatively, if the court sits as a Scottish court when it hears a case on appeal from a Scottish court. Again, however, the wording is somewhat obtuse. It merely stipulates that a decision of the Supreme Court in a case on appeal from the Court of Session *is to be treated as* the decision of a Scottish court. Therefore, while the effect of this provision is that the court is deemed to sit as a Scottish court in appeals from Scotland, it does not necessarily alter the strict legal fact that the court sits as a United Kingdom court, especially given that the court is so named.[24] Furthermore, it remains to be seen—and this will be a matter for the Supreme Court itself to authoritatively decide, though lower courts may take initial views—to what extent these new statutory provisions will impact upon the problems of precedent discussed above.

[24] See Constitutional Reform Act 2005 s 23 (2).

Appendix IV: Statistical information

A Judicial appeal statistics

Number of Scottish Appeals to the House of Lords from the Court of Session:-[1]

Year	Number
2007	14
2006	10
2005	4
2004	10
2003	3
2002	4
2001	4
2000	5
1999	4
1998	7

A detailed account of appeals statistics in a different form from 1993-2004 can be seen at http://www.scotland.gov.uk/Publications/2004/02/18897/33083

[1] These figures are taken from the House of Lords website.

B Scottish appeals to the House of Lords: 1993-2002[2]

Total of 48 cases

91 occasions upon which a Scottish Law Lord sat

62 times from these occasions a Scottish Law Lord gave a speech

149 occasions upon which a non-Scottish Law Lords sat

25 of those occasions they gave a speech.

Scots judges gave an opinion in 68% of the appeals they heard

Non-Scots judges gave an opinion in 17% of the appeals they heard

[2] These figures are taken from J Chalmers 'Scottish appeals and the proposed Supreme Court' (2004) 8 Edin LR 4, 8-10.

C Scottish appeals to the House of Lords: 2003-2009 (inclusive)[3]

Total of 30 cases

54 occasions upon which a Scottish Law Lord sat

45 of those involved a speech from a Scottish Law Lord

96 occasions upon which a non-Scottish Law Lord sat

53 of those involved a speech from a non-Scottish Law Lord

Scots judges gave an opinion in 83% of the cases they heard

Non-Scots judges gave an opinion in 55% of the cases they heard.

[3] These figures are designed to apply Mr Chalmers's methodology to more recent decisions and trends.

D Subject matter of appeals and patterns of judicial decision making

Year	Case	Number of Scottish Law Lords Hearing Decision	Number of Non-Scottish Law Lords Hearing Decision	Number of Speeches by Scottish Law Lords	Number of Speeches by non-Scottish Law Lords
2009					
	1:negligence	2	3	2	3
2008					
	1: statutory interpretation	2	3	2	2
	1: prescription	2	3	1	0
	1: judicial recusal	3	2	2	3
	1: specific implement of an option to purchase	2	3	0	1
	1: UK legislation implementing EC Directive	1	4	1	4
2007					

	1: contempt	2	3	2	0
	1: International Private Law	2	3	1	0
	1: negligence	1	4	1	0
	1: tax	1	4	1	1
	1: Building contract	1	4	1	4
	1: servitudes	2	3	2	3
	1: UK statute	2	3	2	2
	1: judicial review	2	3	2	3
	1: judicial review	2	3	1	1
	1: UK statute	2	3	1	1
2006					
	1: reduction of disposition	2	3	2	3
	1: judicial review	1	4	1	0
	1: personal injury	3	2	3	0
	1: statutory interpretation	2	3	2	2
2005					

	1: statutory interpretation	2	3	2	2
2004					
	1: UK statute	2	3	2	2
	1: IP	1	4	0	1
	1: Property Law	2	3	2	2
	1: tax	1	4	1	4
	1: remoteness of damage	2	3	2	0
	1: judicial review	2	3	2	2
2003					
	1: tax	1	4	1	4
	1: UK statute	2	3	2	3
	1: res ipsa loquitur	2	3	1	0
Total	**30**	**54**	**96**	**45**	**53**

* In two of these cases the House issued a report to which all members had contributed, and therefore has been counted as a speech by each member.

In relation to cases in which non-Scottish judges gave a speech:

Total cases in which *any* non-Scots judge gave a speech was 22, out of a total of 30 (73%).

Of these 22 cases the subjects were as follows:

11 clearly involved UK statute interpretation

5 involved negligence or related subjects

4 involved judicial review

2 involved property law

1 involved intellectual property law

1 involved prescription

1 involved recusal of a judge

1 involved contempt

1 involved specific implement

1 involved building contracts

1 International private law

1 involved reduction

E HOUSE OF LORDS SCOTTISH BUSINESS 1961-2002**

Year	*Initiated*	*Disposed of*	*Affirmed*	*Reversed*	*Withdrawn*	*Pending*
2002	7	13	1	3	9	6
2001	2	3	—	3	—	12
2000	14	8	4	1	3	14
1999	4	5	4	—	1	6
1998	5	7	2	5	—	8
1997	6	15	8	3	4	10
1996	15	7	4	2	1	19
1995	14	10	5	2	3	11
1994	8	7	5	1	1	7
1993	2	8	2	3	3	6
1992	15	11	6	1	4	12
1991	8	4	2	—	2	8
1990	6	3	1	1	1	4
1989	10	10	5	5	-	13
1988	14	4	2	—	2	10
1987	6	12	7	2	3	3

1986	10	8	4	1	3	9
1985	10	7	1	3	3	7
1984	4	6	—	3	3	3
1983	15	11	8	1	2	5
1982	5	10	5	2	3	1
1981	12	10	6	1	3	6
1980	7	4	—	—	4	
1979	5	3	1	1	1	3
1978	5	3	2	1	—	3
1977	5	2	—	1	1	3
1976	1	3	1	—	2	—
1975	4	4	3	1	—	2
1974	6	6	—	2	4	2
			by judgment			
1973	—	3	2		1	2
1972	3	8	8		—	—
1971	9	12	8		4	5
1970	13	6	5		1	9
1969	7	13	7	3	3	2
1968	9	4	1	1	2	8

			by judgment			
1967	5	13	11		2	3
1966	12	6	4		2	11
Totals	**283**	**269**	**97**	**53**	**81**	**239**
percentages			*44*	*24*	*32*	
Annual averages	*7.77*	*7.01*	*3.01*	*1.70*	*2.6*	*6.75*
Average for five years ended 1965 (ie 1961-65)						
1961-65	*11*	*10*	*8*		*2*	*7*

** *Source:* Scottish Civil Judicial Statistics 1966-2002.

Note: between 1966 and 1967, and again between 1970 and 1973, it is not recorded whether appeals disposed of by judgment were affirmed or reversed. The percentages and annual average figures therefore exclude these years. A minor mystery is why, when 283 appeals were initiated and 269 disposed of between 1966 and 2002, there should have been only six pending at the end of the period.

For additional context see the relative figures of English/Welsh and Northern Ireland appeals disposed of by the House over the period 1997-2001.

F Digest of appeals to the House of Lords 1996-2009[4]

2009

Mitchell v Glasgow City Council [2009] UKHL 11

- two Scottish Lords of Appeal in Ordinary
- **All 5** Law lords give a full opinion
- Delictual liability—accepted that law in England and Scotland is the same on the point in issue.
- Appeal allowed

2008

Bowden v Poor Sisters of Nazareth [2008] UKHL 32

- two Scottish Lords of Appeal in Ordinary
- single speech of Lord Hope of Craighead
- all other law lords concur without reasons
- Appeal dismissed

Common Service Agency v Scottish Information Commissioner [2008] UKHL 47

- two Scottish Lords of Appeal in Ordinary
- Leading judgments given by Lords Hope and Rodger. Lord Mance and Lady Hale give very brief opinions—Lady Hale agrees with the result

[4] Judicial Salaries from 01/04/2009: Lord Chief Justice £239,845; Lord President £214,165; Lord Justice Clerk £206,857; Lords of Appeal in Ordinary £206,857; Sheriff Principal £138,548; Sheriff £128,296: http://www.justice.gov.uk/publications/docs/judicial-salaries-2009.pdf.

reached by Lord Hope, and while she may have reached it differently she states it would be confusing for her to elaborate; Lord Mance concurs with the lead judgments, and insofar as they differ expresses a preference for Lord Hope's approach.
- Appeal allowed

Helow v Secretary of State for the Home Department [2008] UKHL 62

- Two Scottish Lords of Appeal in Ordinary **and** Lord Cullen of Whitekirk
- Lords Rodger and Hope give full judgments, as does Lord Mance. Lord Cullen gives a short judgment, and Lord Walker concurs but with some caution
- Whether Lady Cosgrove ought to have recused herself in a case involving a Palestinian asylum seeker when she was a member of the International Association of Jewish Lawyers and Jurists
- Appeal dismissed

Simmers v Innes [2008] UKHL 24

- Two Scottish Lords of Appeal in Ordinary
- Only judgment is given by Lord Neuberger of Abbotsbury
- Action for specific implement in relation to an option to purchase
- Appeal dismissed

Spencer-Franks v Kellogg Brown & Root Ltd [2008] UKHL 46

- One Scottish Lord of Appeal in Ordinary
- All law lords give speeches
- UK statutory instrument implementing EEC directive on Work Equipment—the Inner House had followed a Court of Appeal case, and the Lords appeared to want to restrict the Court of Appeal's jurisdiction.
- Appeal allowed

2007

Beggs v Scottish Ministers [2007] UKHL 3

- Two Scottish Lords of Appeal in Ordinary
- Two judgments from Scottish law lords
- Liability of civil servants for contempt of court if ministerial undertakings are not implemented
- Appeal allowed in part

Clarke v Fennoscandia Ltd [2007] UKHL 56

- Two Scottish Lords of Appeal in Ordinary
- Single judgment from Lord Rodger
- International Private Law/Conflict of Law
- Appeal dismissed

Hamilton v Allied Domecq plc [2007] UKHL 33

- One Scottish Lord of Appeal in Ordinary
- Single judgment from Lord Rodger
- Reparation for loss of a chance
- Appeal dismissed (pointed remark that reasons were same as the 2nd Division's).

HMRC v William Grant & Sons Distillers Ltd [2007] UKHL 15

- One Scottish Lord of Appeal in Ordinary
- BUT, conjoined appeal with an English one for the interpretation of corporation tax.

Melville Dundas Ltd v George Wimpey UK Ltd [2007] UKHL 18

- One Scottish Lord of Appeal in Ordinary
- Three lead judgments, one smaller, and one concurs with Lord Hoffmann
- Building contract
- Appeal allowed (3:2, with Lord Hope in the majority)

Moncrieff v Jamieson [2007] UKHL 42

- Two Scottish Lords of Appeal in Ordinary
- All law lords give reasoned judgment
- Servitudes (and comparative observations on easements in English law)
- Appeal dismissed

J & H Ritchie Ltd v Lloyds Ltd [2007] UKHL 9

- Two Scottish Lords of Appeal in Ordinary
- Four law lords give a judgment
- Sale of goods—repair and right to cure
- Appeal allowed

Somerville v Scottish Ministers [2007] UKHL 44

- Two Scottish Lords of Appeal in Ordinary
- All law lords give a judgment
- Judicial review
- Appeal allowed & dismissed

Whaley v Lord Advocate [2007] UKHL 53

- Two Scottish Lords of Appeal in Ordinary
- Main judgment given by Lord Hope

- Human Rights and Fox Hunting
- Appeal dismissed

Wilson v Jaymarke Estates Ltd [2007] UKHL 29

- Two Scottish Lords of Appeal in Ordinary
- The lead judgment is given by Lord Hoffmann, and Lord Hope observes that the right of appeal from Scotland must not be abused
- Appeal dismissed

2006

Henderson v 3052775 Nova Scotia [2006] UKHL 21

- Report (52nd) of the Appellate Committee: Two Scottish Lords of Appeal in Ordinary
- Opinion of the whole committee
- Appeal allowed
- Reduction of disposition as a gratuitous alienation

Land Securities Group Plc v Scottish Ministers [2006] UKHL 48

- One Scottish Lords of Appeal in Ordinary
- Single opinion delivered by Lord Rodger of Earlsferry
- Judicial review of ministers decision to allow an amendment to the regeneration of Ravenscraig plan
- Appeal dismissed

Robb v Salamis (M&I) Ltd [2006] UKHL 56

- Two Scottish Lords of Appeal in Ordinary AND Lord Clyde
- All three Scottish law lords give an opinion, no other opinions
- Personal injuries under statutory duty of care

- Appeal allowed

Tehrani v Secretary of State for the Home Department [2006] UKHL 47

- Two Scottish law lords
- Opinions from Lord Nicholls (who makes a point of beginning with emphasis on the UK wide application of the statute under consideration); Lord Scott (who emphasises the same); Lord Rodger and Hope give longer judgments, and Lord Carswell concurs in them
- Jurisdiction of the Court of Session as regards the decisions of an immigration tribunal—held not subject to its supervisory jurisdiction as there were statutory appeal procedures
- Appeal allowed

2005

Davidson v Scottish Ministers [2005] UKHL 74

- Two Scottish Lords of Appeal in Ordinary
- Lord Nicholls gives an opinion (interestingly, overtly stating that English and Scottish law should be at one on this point, and without concurring with either Scottish law lord); Lord Hope & Lord Rodger give reasoned judgments; Lord Carswell is careful to concur, but says he is not qualified to talk about definitions of Scots law at a more general level; Lord Mance also gives a judgment (note Lord Carswell and Lord Mance concur with Lord Nicholls on the question of matters under the Court of Session's supervisory jurisdiction, thus constituting the majority technically)
- Coercive orders against the Crown or ministers
- Appeal allowed

2004

Archibald v Fife Council [2004] UKHL 32

- Two Scottish Lords of Appeal in Ordinary
- Lead judgment by Lady Hale, though speeches from Lords Hope & Rodger
- Appeal allowed
- Employment tribunal decision, lawful discrimination

Buchanan v Alba Diagnostics Ltd [2004] UKHL 5

- One Scottish Lord of Appeal in Ordinary (Rodger may not have sat as he was in the Inner House on the judgment appealed from)
- Lead judgment given by Lord Hoffmann (in English terminology of 'charges', a phrase unknown to Scots law); with everyone else concurring
- Appeal dismissed (without much by way of judgment—very short)

Burnett's Trustee v Grainger [2004] UKHL 8

- Two Scottish Lords of Appeal in Ordinary
- Lead judgments by Lords Hope & Rodger. But, Lord Hoffmann suggests that he is not satisfied that the law is satisfactory, or necessary; Lord Hobhouse also bows to this inevitability of following the Scottish law lords before stating his disquiet about doing so; Lord Bingham concurs.
- Son of *Sharp*: split ownership in the context of bankruptcy, and vortex of unjustified enrichment and trust law
- Appeal dismissed

HMCIR v Scottish Provident Institution [2004] UKHL 52

- One Scottish law lord
- Unanimous decision Report (4th)
- Taxation

- Appeal allowed

Simmons v British Steel Plc [2004] UKHL 20

- Two Scottish law lords
- Judgments from: Lord Hope & Rodger, others concur
- Remoteness of damages for personal injury
- Appeal dismissed

Stewart v Perth & Kinross District Council [2004] UKHL 16

- Two Scottish Lords of Appeal in Ordinary
- Judgments from Lords Hope; Rodger; Carswell (general observations on the nature of the Civic Government (Sco) Act 1982) and Lady Hale (decision, and indeed a narration of the 'clear' English approach).
- Judicial review of a second hand car sales licence conditions
- Appeal dismissed

2003

CR Smith Glaziers (Dunfermline) Ltd v Commissioners of Customs and Excise [2003] UKHL 7

- One Scottish Lord of Appeal in Ordinary
- Judgments: Lord Hoffmann; Lord Hope, and Lord Slynn (diss)
- Appeal allowed
- Taxation

MacDonald v Advocate General for Scotland [2003] UKHL 34

- Two Scottish Law Lords (conjoined appeal with English appeal)

- Judgments: Lord Nicholls; Lord Hope; Lord Hobhouse; Lord Scott; Lord Rodger
- Appeal dismissed
- Sex Discrimination

Thomson v Kvaerner Govan Ltd [2003] UKHL 45

- Two Scottish Lords of Appeal in Ordinary
- Single reasoned speech from Lord Hope; but Lord Steyn dissent by simply saying he disagrees and prefers the approach of the Inner House.
- Appeal allowed
- Res ipsa loquitur

2002

Earl of Balfour v Keeper of the Registers of Scotland [2002] UKHL 42

- Three Scottish Lords of Appeal in Ordinary (Hope, Rodger, and Clyde)
- Full judgments from Lords Hope, Rodger and Clyde
- Appeal allowed
- Entails, more particularly trusts used to subvert the objectives of the Entail (Amendment) Scotland Act 1848

Caledonia North Sea Ltd v British Telecommunications plc [2002] UKHL 4

- One Scottish Law Lord (Lord Mackay of Clashfern)
- Speeches from Lords Bingham, Mackay, Hoffmann
- Appeal dismissed
- Indemnity, Subrogation and consequential loss relating to insurance contracts

[5]

King v Bristow Helicopters [2002] UKHL 7

- conjoined appeal from England and Scotland
- Two Scottish law lords
- Appeal allowed in Sco case, dismissed in English case
- Speeches from Lords Steyn; Hope, and Hobhouse. Brief concurring opinions from Lords Nicholls and Mackay
- Warsaw convention for compensation of aircraft passengers (desire for uniform interpretation across the world)

Robertson v Fife Council [2002] UKHL 35

- Two Scottish law lords
- Only Lord Hope gives a speech
- Provision of accommodation under the Social Work (Scotland) Act 1968
- Appeal allowed

2001

BP Exploration Operating Co Ltd v Chevron Transport [2001] UKHL 50

- Two Scottish Law lords
- Speeches from all except Lord Slynn
- Prescription and limitation of actions; and, meaning of the Harbours, Docks, Piers Clauses Act 1847, which is what the English law lords are mainly concerned to comment upon
- Appeal allowed

[5] See *Co-operative Retail Services Ltd v Taylor Young Partnership and Ors* [2002] UKHL 17—where there were three, out of a total of five, Scottish law lords sitting on an English appeal.

2000

Chief Adjudication Officer v Faulds [2000] UKHL 11th May 2000

- Three Scottish law lords
- Speeches from Lords Clyde, Hope and Hutton (Hutton Diss)
- Industrial injuries compensation
- Appeal allowed

Dingley v Chief Constable of Strathclyde Police [2000] UKHL 9th March 2000

- Two Scottish law lords (Hope & Clyde)
- Single speech from Lord Hope
- Personal injury decision (unusual in that the appeal was one of fact, and some case law dealing with right to appeal**)
- Appeal dismissed

Glasgow City Council v Marshall [2000] UKHL 3rd February 2000

- Two Scottish law lords (Mackay & Hope)
- Lead speech given by Lord Nicholls
- Equal pay Act
- Appeal dismissed

Taylor v Secretary of State for Scotland [2000] UKHL 11th May 2000

- One Scottish law lord (Hope)
- Equal opportunities (judicial review)
- Appeal dismissed
- Only Hope gives a speech

Wisely v Fulton [2000] UKHL 6th April 2000

- Two Scottish law lords (conjoined appeal from Sco/Eng)
- Speeches from Lords Hope, Clyde and Millett
- Should assessment of damages take account of social security benefits? (Agreed that the applicable law was the same, as both governed by the same UK statute.)
- Appeals dismissed

1999

Axis West Developments Ltd v Chartwell Land Investments Ltd [1999] UKHL 15th July 1999

- Two Scottish law lords
- Speeches from Lords Hope & Clyde
- Servitudes
- Appeal dismissed

Governor and Company of the Bank of Scotland v Brunswick Development (1987) Ltd [1999] UKHL 29th April 1999

- One Scottish law lord (Clyde)
- Speeches by Lords Hoffmann & Clyde
- Rectification of document
- Appeal allowed

MacFarlane v Tayside Health Board [1999] UKHL 25th November 1999

- Two Scottish law lords (Hope & Clyde)
- Speeches by all judges
- Wrongful birth

- Appeal partially allowed

1998

BT Plc v James Thomson & Sons [1998] UKHL 10th December 1998

- One Scottish law lord (Lord Mackay)
- Single speech from Lord Mackay
- Delictual liability
- Appeal allowed

Dollar Land (Cumbernauld) Ltd v CIN Properties [1998] UKHL 16th July 1998

- Two Scottish law lords (Jauncey & Hope)
- Speeches from Lord Jauncey & Hope
- Unjustified enrichment and irritancy of a lease
- Appeal dismissed

Hutchison Reid v Secretary of State for Scotland [1998] UKHL 3rd December 1998

- Two Scottish law lords (Clyde & Hope)
- Speeches from Lord Lloyd of Berwick (stating that the appeal was really discussing an English decision, which the Court of Session IH had stated was not in point due to linguistic differences, an argument which could not be sustained in the Lords); Hope; Clyde; Hutton
- Appeal allowed
- Detention of psychopathic prisoners/patients

Krol v Craig [1998] UKHL 3rd December 1998

- One Scottish law lord
- Main speech by Lord Hope

- Appeal dismissed
- Community care orders

Redrow Homes Ltd v Bett Brothers Plc [1998] UKHL 22nd January 1998

- Three Scottish law lords (Jauncey, Hope and Clyde)
- Speeches by Lords Clyde & Jauncey
- Appeal dismissed
- Copyright and Patents

Stewart v Secretary of State for Scotland [1998] UKHL 22nd January 1998

- One Scottish law lord
- Main speech by Lord Jauncey, with small supplement from Hutton
- Removal of Sheriff from Office for 'inability'
- Appeal dismissed

Strathclyde Regional Council v Wallace [1998] UKHL 22nd January 1998

- Two Scottish law lords (Clyde & Hope)
- Only one speech—that of Lord Browne-Wilkinson
- Equal pay
- Appeal dismissed

1997

City of Edinburgh Council v Secretary of State for Scotland [1997] UKHL 16th October 1997

- Three Scottish law lords (Mackay; Hope and Clyde)
- Main speech from Clyde, and small one from Hope
- Planning permission

- Appeal allowed partly

Clydesdale Bank v Davidson [1997] UKHL 16th December 1997

- Three Scottish law lords (Jauncey, Clyde and Hope)
- Speeches from all Scottish law lords
- Appeal dismissed
- Possession of property—can pro indiviso owners grant a lease to one of their own number?

Herd v Clyde Helicopters Ltd [1997] UKHL 27th February 1997

- Three Scottish law lords (Mackay, Hope and Clyde)
- Speeches from Lord Hope and Mackay
- Reparation for death caused by pilot
- Appeal dismissed

Girvan v Inverness Farmers Dairy [1997] 13th November 1997

- Three Scottish law lords (Mackay, Hope and Clyde)
- Speeches from Hope and Clyde
- Reparation case
- Appeal dismissed

Mulvey v Secretary of State for Social Security [1997] UKHL 13th March 1997

- One Scottish law lord (Lord Jauncey)
- Speech from Jauncey alone
- Social security and bankruptcy
- Appeal dismissed

Sanderson v McManus [1997] UKHL 6th February 1997

- Two Scottish law lords (Hope & Clyde)
- Main speech Hope, with supplement from Clyde
- Family law—access rights for umarried father
- Appeal dismissed

Sharp v Woolwich Building Society [1997] UKHL 27th February 1997

- Three Scottish law lords (Keith, Jauncey and Clyde)
- Speeches from Clyde and Jauncey
- Property law and floating charges
- Appeal allowed

Smith v Bank of Scotland [1997] UKHL 12th June 1997

- Two Scottish law lords (Jauncey & Clyde)
- Speeches from Clyde and Jauncey
- Undue influence
- Appeal allowed

Strathclyde Regional Council v Zafar [1997] UKHL 27th November 1997

- Two Scottish law lords (Hope & Clyde)
- Only speech, Lord Browne-Wilkinson
- Race discrimination
- Appeal dismissed

Abnett v British Airways Plc [1996] UKHL 12th December 1996

- Two Scottish lords (Jauncey & Hope)
- Single speech from Hope

- Warsaw convention on air travel
- Appeals dismissed

Lightbody v Jacques [1996] UKHL 21st November 1996

- Two Scottish lords
- Single Speech from Clyde, with small one from Jauncey
- Family law—right to matrimonial property
- Appeal dismissed

Ross & Cromarty DC v Patience [1996] UKHL 12th December 1996

- One Scottish law lord (Clyde)
- Only Clyde gives speech
- Pre-emption clauses
- Appeal allowed

G Digest of Scottish Devolution Issue cases

2009

HMA v Murtagh [2009] UKPC 35

- Lords Hope; Scott; Rodger; Brown and Collins
- Detailed opinions from Lords Hope and Rodger, though Lords Scott, Brown and Collins also give brief opinions
- Reference from High Court

2008

McDonald v HMA [2008] UKPC 46

- Lords Hope; Rodger; Bingham; Scott and Neuberger
- Detailed opinion from Lords Rodger and Hope
- Appeal dismissed
- Duty of the Crown to disclose materials for an appeal against conviction: Lord Advocate, as member of the Scottish Executive, cannot act in a manner incompatible with Art 6 (1) of the ECHR: Scotland Act 1998 s 57 (2). The immediate case also includes discussion of the interaction between procedural rules of the Appeal Court and the jurisdiction of the Privy Council.

Burns v HMA [2008] UKPC 63

- Lords Hope; Rodger; Walker; Neuberger and Lady Cosgrove
- Detailed opinion from Lady Cosgrove and Lord Rodger
- Appeal allowed
- The right to a fair trial, more particularly the right to a public hearing within a reasonable time. This case involved indecent images, and the arrest of the appellant in England, however there was delay between his

processing within the Scottish criminal justice system. The question therefore was when he was charged for the purposes of Art 6 (1), with the Judicial Committee deciding that the UK was the signatory to the ECHR, and there was a long history of criminal law enforcement co-operation. With this in mind, the charge must have occurred upon the earlier date in English custody. (This would not necessarily bar a trial however).

2007

DS v HMA [2007] UKPC 36; 2007 SC (PC) 1; 2007 SLT (PC) 1026

- Lords Hope; Rodger; Carswell; Brown; and Lady Hale
- Main opinions from Lords Rodger and Hope; however Lady Hale and Lord Brown give supplementary opinions, which seem to be aimed at a wider audience (compatibility jurisprudence derived from Strasbourg & the warping assumption that an accused should be able to keep previous convictions out of the jury's way.
- Appeal dismissed
- Challenge to the Scottish Parliament's competence to alter the manner of questioning witnesses in sexual offence cases. Notably, ss 274, 275, 275A stipulate that the accused must seek permission to question a witness, and should they secure such permission, their prior convictions will be put to the jury. Did this violate Art 6?

Spiers v Ruddy [2007] UKPC D2; [2008] 1 AC 873; 2008 SLT 39

- Lords Bingham; Hope; Rodger; Mance, and Neuberger
- Detailed opinions from Lords Bingham; Hope, and Rodger
- Lord Advocate requiring a reference from the sheriff to the Judicial Committee under Scotland Act 1998 Sch 6 para 33. The Board considered two questions, the first of which it couldn't answer as that was properly a matter for the sheriff, the second question was whether the Lord Advocate is able to proceed to prosecute the charges after a reasonable period of time for the purposes of Art 6, and where there are no other reasons against a fair trial. Held that the Lord Advocate did have such power, and the approach in *Attorney General's Reference No 2 of 2001)* [2003] UKHL 68 (Seven Judges) preferred to that in *R v HMA* [2002] UKPC D3 (3:2 majority, the three being Scottish judges Hope; Clyde; and Rodger; while in the minority were two English judges Steyn & Walker); 2003 SC (PC) 21, [2004] AC 462, and they specifically 'depart' from *R v HMA*.

Indeed, Bingham suggests that the approach in the two jurisdictions should be the same.

2006

Kearney v HMA [2006] UKPC D1; 2006 SC (PC) 1; 2006 SLT 499

- Lords Bingham; Hope; Carswell; Brown and Lady Hale
- Lords Bingham; Hope and Carswell give opinions
- Appeal dismissed
- Here Mr RF MacDonald QC appointed as a temporary judge under the Law Reform (Miscellaneous Provisions)(Scotland) Act 1990 s 35 (3); because a temporary judge the appellant questioned his partiality/independence under Art 6, and the surrounding Strasbourg jurisprudence, and accordingly suggested that the Lord Advocate, by virtue of s 57 (2) had no power to bring a prosecution before a tribunal that could breach art 6. Unanimously decided that there was no evidence that members of the Faculty of Advocates could not discharge judicial functions impartially; nor was there evidence of a conditional connection between a temporary judge and the Lord Advocate.

Robertson v Higson [2006] UKPC D2; 2006 SC (PC) 22; 2006 SLT 478

- Lords Bingham; Hope; Rodger; Carswell, and Brown
- Detailed opinions from Hope; Rodger and supplementary observations from Carswell
- Appeal dismissed
- Notable for the fact that Lord Hope justifies, again, the manner in which the Privy Council did not expect to have to examine the intricacies of Scottish Criminal law. However, that is what has to happen, and the judicial committee must delve into not only the devolution itself, but all the surrounding context of the devolution issue. The case involved attempts to present bills of suspension on the basis that their convictions were secured before temporary sheriffs (who went west with *Starrs v Ruxton* 2000 JC 208), and thus breached Art 6 (1). That the convictions were so obtained was not disputed by the Crown, however they acquiesced for a sufficient period that they could not secure a remedy for the breach. Hence the discussion of the competence of the Board in the context surrounding the devolution itself.

2005

Holland v HMA [2005] UKPC D1; 2005 SC (PC) 3; 2005 SLT 563

- Lords Bingham; Hope; Rodger; Carswell, and Lady Hale
- Lead opinion from Rodger, with a supplementary opinion from Hope
- Appeal allowed
- The appellant suggested that his art 6 rights had been breached by the Lord Advocate prosecuting in a manner incompatible with this right on two grounds: 1) dock identification, and 2) failure of the Crown to disclose information relevant to his defence. Special leave granted (i.e. the Appeal Court refused leave to appeal). Held that dock identification is not necessarily contrary to art 6; however, while the Appeal court held separate hearings for the two issues, the Judicial Board had to hear the two simultaneously to get to the key question of whether there had been a fair trial. Accordingly, the Crown's failure to disclose the criminal indictments relating to one of the witnesses meant a fair trial had not been held.

Sinclair v HMA [2005] UKPC D2; 2005 SC (PC) 28; 2005 SLT 553

- Lords Bingham; Hope; Rodger; Carswell and Lady Hale
- Opinions from Lords Hope and Rodger
- Appeal allowed
- Once more concerned with the actions of the Lord Advocate, and the requirement to act within the stipulations of the ECHR as a result of s 57 (2) of the Scotland Act 1998. Once more, this case is concerned with the duty of disclosure upon the Crown, in this case in relation to the statement made by a witness that was important for the provision of corroboration. Accordingly, the Lord Advocate's failure to release this statement constituted a material failure of the duty to disclose, which seriously affected the appellants defence and breached art 6.

2004

Flynn v HMA [2004] UKPC D1; 2004 SC (PC) 1; 2004 SLT 863

- Lords Bingham; Hope; Rodger; Carswell and Lady Hale
- Opinions from All law lords
- Appeal dismissed
- Whether the Convention Rights (Compliance) (Scotland) Act 2001, as an Act of the Scottish Parliament, was contrary to the provisions of the Human Rights Act. More particularly, whether the arrangements under the old regime with regard to parole board hearings, and the setting of the punishment part of sentences would contravene the Convention. There was some difference of opinion among the judges as to the reasoning involved, though all agreed that, providing the High Court could take account of the previous procedures in setting the punishment parts, the Act was within the Parliament's competence.

Moir v HMA [2004] UKPC D2; 2005 SC (PC) 1; 2005 SLT 981

- Lords Bingham; Hope and Rodger (Reasons for decision on a petition for special leave)
- Opinion of Board: the complainer suggested that his art 6 rights were prejudiced by ss 274 & 275 of the Criminal Procedure (Scotland) Act 1995, and the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002. Leave to appeal was refused by the High Court. The Board decides that it would be better to allow the trial to proceed, and then thereafter consider the nature of the devolution issue because the legislation is 'complex' and it would be better to have the '…benefit of seeing how it has worked out in practice.'
- Petition dismissed

2003

Clark v Kelly [2003] UKPC D1; 2003 SC (PC) 77; 2003 SLT 308

- Lords Bingham; Hoffmann; Hope; Hutton, and Rodger
- Held that prosecution in the district court is not contrary to art 6
- The question before the Board was whether prosecutions brought in the district court were contrary to art 6. The procurator fiscal in this sense represents the Lord Advocate, who is subject to s 57 (2) of the Scotland Act 1998. More particularly, the attack upon the right to a fair trial in this case concerned the clerk of the court, who by statute had to be employed

by a local authority, and also constituted a component of the court. However, it was held that this did not result in a corresponding lack of impartiality.

2002

Dyer v Watson [2002] UKPC D1; 2002 SC (PC) 89; 2002 SLT 229

- Lords Bingham; Hope; Hutton; Millett, and Rodger
- Lengthy opinions from Bingham; Rodger; Hope; while, Millett and Hutton give reasonably long opinions too.
- Appeal partially allowed
- A lengthy discussion of the nature of the reasonable time requirement contained in art 6, which of course feeds in to the Lords Advocate's role by virtue of s 57 (2) and Sch 6. Opted not to decide the point with regard to whether the prosecution could proceed when there had been a breach of the reasonable time requirement, preferring to wait for *R v HMA*; and *Att-Gen's Reference cases*

Mills v HMA [2002] UKPC D2; 2003 SC (PC) 1; 2002 SLT 939

- Lords Nicholls; Mackay; Steyn; Hope, and Scott
- Opinions from Hope and Steyn
- Appeal dismissed
- Once more a discussion of the reasonable time requirement, in this case a delay in the hearing of an appeal. This seems to have been admitted, the dispute was as to the remedy—would it necessarily have to be quashed, or would the discount in sentence applied by the Appeal Court be sufficient. Held that the discount applied by the Appeal Court was sufficient remedy for the breach of art 6 rights.

R v HMA [2002] UKPC D3; 2003 SC (PC) 21; 2003 SLT 4

- Lords Steyn; Hope; Clyde; Rodger, and Walker
- Detailed opinions from all member of the Board
- Appeal Allowed (3:2—the three Scottish law lords forming the majority)

- This appeal was concerned with the question whether if the Lord Advocate has breached the art 6 requirement that a prosecution ought to be brought within a reasonable time, any subsequent prosecution must necessarily be barred. It was held by the Scottish law lords that the effect must be yes, the Lord Advocate is barred from proceeding; whereas, the Lords Steyn and Walker point out that swift procedure thereafter would not constitute a further and continuing breach, and even if it did it would not necessarily bar a prosecution. They are also concerned that the conclusion reached by the Scottish majority would put Scots law on a different footing from the law of England, and indeed the law of other countries. [Note: the decision has been departed from, see above].

2001

McIntosh Petr [2001] UKPC D1; 2001 SC (PC) 43; 2001 SLT 59

- Lords Bingham; Hoffmann; Hope; Clyde; Hutton
- Opinions from Lords Bingham & Hope
- Appeal allowed
- This case concerned the Lord Advocate's inability to act in manner contrary to art 6 of the ECHR, as provided for by s 57 (2) of the Scotland Act 1998. In the immediate case the provision concerned was the provisions of the Proceeds of Crime (Scotland) Act 1995 s 3(2) which regulates confiscation orders. The question was whether the procedure represented a violation of art 6 (2) of ECHR concerning the presumption of innocence, which was held to be inapplicable since the proceedings were not *per se* criminal, and indeed would only proceed after a conviction. Even if it were applicable, there would be no breach of art 6 (2).

Follen v HMA [2001] UKPC D2; 2001 SC (PC) 105; 2001 SLT 774

- Lords Bingham; Hope and Millett (reasons pertaining the decision on petition for special leave)
- Opinion of the Board
- Special leave to appeal refused
- The appellant had been charged with drug dealing offences, and there was some question as to the calculation of the periods in custody; however, these were a matter for the Scottish criminal courts. The appellant had raised an art 6 argument before the trial judge—the standard reasonable

time under art 6 (1). The appellant appealed against the decision relating to the computation of time periods, and the Appeal Court refused leave to appeal, without reasons, to the judicial committee. It subsequently became clear that the devolution issue had been expressly abandoned by the appellant's solicitor before the Appeal Court. Accordingly, because the jurisdiction of the Judicial Committee flowed solely from Sch 6 para 13 of the Scotland Act 1998, which required a determination of a devolution issue to have occurred in the Appeal Court, which it had not. The Board also gently suggest that it may be of assistance to them in the future if the Appeal Court could give reasons for the refusal of leave to appeal.

McLean v HMA [2001] UKPC D3; 2002 SC (PC) 1; 2001 SLT 780

- Lords Nicholls; Hope; Clyde; Hobhouse, and Millett
- Opinions from Lords Nicholls, Hope, Clyde, and Hobhouse
- Appeal dismissed
- The question was whether the Court of Appeal was right to state that the Lord Advocate would not be in breach of s 57 (2) if prosecution were to proceed. The question was whether appellants were prejudiced in their art 6 right to a fair trial; specifically, whether the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999 (SI 1999/491) meant that the appellants were put at a disadvantage in the argument of their case. It was held, that unsatisfactory as the arrangement could potentially be, they did not in themselves cause any prosecution to breach art 6.

Millar v Dickson [2001] UKPC D4; 2002 SC (PC) 30; 2001 SLT 988

- Lords Bingham; Nicholls; Hope; Clyde, and Scott
- Opinions from Lords Bingham; Hope, and Clyde
- Appeal allowed
- Question whether the Lord Advocate could prosecute persons before temporary sheriffs after 20th May 1999 when he became a member of the Scottish executive. In addition, the decision in *Starrs v Ruxton* 2000 JC 208 was reached on the 11th November 1999, and the convictions in the instant case were reached between 20th May 1999 and 11th November 1999. The question was whether the Lord Advocate had breached the art 6 (1) requirements by prosecuting, alongside a more limited argument relating to waiver on the part of the accused. It was held that the prosecutions taken in this time did amount to a breach of art 6, and as a result of s 57 (2) the proceedings were thus vitiated. Accordingly, the Board ordered the Appeal Court to make the appropriate orders.

Anderson v The Scottish Ministers [2001] UKPC D5; 2002 SC (PC) 63; 2001 SLT 1331

- Lords Slynn; Hope; Clyde, Hutton, and Scott
- Opinions from Lords Hope & Clyde
- Appeal dismissed
- The first consideration of the validity of an Act of the Scottish Parliament, more particularly the first Act of the Scottish Parliament—was art 5 of the ECHR breached by the Mental Health (Public Safety and Appeals) (Scotland) Act 1999. It was found that the provisions of the Act did not breach the provisions of art 5 of the ECHR.

2000

Montgomery v HMA 2001 SC (PC) 1; [2003] 1 AC 641; 2001 SLT 37

- Lords Slynn; Nicholls; Hoffmann; Hope, and Clyde
- Opinions from all law lords
- Appeal dismissed
- The question in issue was whether the pre-trial publicity surrounding the Chokhar murder was such as to prevent any prosecution by the Lord Advocate—the appeal was brought with reference to s 57 (2) & Sch 6 para 13 (a) of the Scotland Act 1998. The law lords were unanimous in their opinion that the appeal should be dismissed, and indeed that the fact specific issues pertaining to the pre-trial publicity did not operate to preclude a fair trial, and hence the Lord Advocate would be acting compatibly with the Convention. However, there was some discord concerning the extent to which one the issue was really a devolution issue at all, particularly interesting are Lord Hoffmann's careful analysis of the manner in which the Lord Advocate should be considered when bringing a prosecution, and indeed that the guiding principles here were a matter 'of United Kingdom law.'

Hoekstra v HMA (No 3) 2001 SC (PC) 37; [2001] 1 AC 216; 2001 SLT 28

- Lords Slynn; Hope and Clyde (Petition for special leave to appeal)
- Opinion of the Board
- Appeals dismissed
- In this purported reference the Board held that there was no devolution issue. The issue arose as a result of a decision of the Appeal Court, whereby Lord McCluskey sat as a temporary judge, after writing articles in a newspaper which could raise the possibility that he could not be considered impartial for the purposes of Human Rights issues. A differently constituted Appeal Court set aside the decision of the original Appeal Court and ordered the case to be re-heard by a differently constituted Appeal Court. The appellant sought to suggest that this action purported to review a decision of the High Court of Justiciary which, they argued, contravened s 124 (2) of the Criminal Procedure (Scotland) Act 1995, which accords finality to a decision of the High Court of Justiciary. The appellants sought to argue that the decision of the Appeal Court in the second case, by setting aside the prior decision, was an attempted amendment for which the Scottish Ministers were responsible. Unsurprisingly, this received short shrift from the Board—the High Court of Justiciary has nothing to do with the Scottish Ministers. Accordingly, this could not be considered to be a devolution issue—the jurisdiction of the board was not a broad constitutional one, and was restricted to the statutory provisions. The actions of the High Court of Justiciary, as the supreme court of criminal jurisdiction within the Scottish legal system, in regulating its own procedures were not open in any way to review by the Judicial Committee.

Brown v Stott 2001 SC (PC) 43; [2003] 1 AC 681; 2001 SLT 59

- Lords Bingham; Steyn; Hope; Clyde and Kirkwood
- Opinions from all members of the Board
- Appeal allowed
- The devolution issue in this case was whether the questioning of the appellant, in a state of drunkenness, with regard to who was driving a car at a certain time infringed her article 6 rights. More particularly, was the procurator fiscal entitled to rely upon an admission obtained under s 172 (2) (a) of the Road Traffic Act 1988. The Appeal Court had held that the use of such evidence would compromise the appellant's right to a fair trial under art 6 of the ECHR. The Judicial Committee emphasised the holistic requirement that the ultimate question is whether a fair trial can be, or indeed has been, carried out. After a detailed consideration of the ECHR

jurisprudence pertaining to art 6, it is further established that the provisions of s 172 are not sufficiently disproportionate to deprive appellant of the protections afforded by art 6.

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